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In the

Supreme Court of the United States

October Term, 1974

No. 74-1583

JIM L. NAPPER, ET UX.,

Petitioners

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC., ET AL.,

Respondents

Petition For A Writ of Certiorari
To The
United States Court of Appeals
For The Fifth Circuit

H. AVERIL SWEITZER
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. . . it appears to us that the doctrine [of res judicata] . . . must be treated as a compromise between two conflicting interests; the convenience of avoiding a multiplicity of suits and the adequacy of the remedies afforded for conceded wrongs.

—LEARNED HAND[1]

Such a rule of public policy must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and fair day in court.

—HERBERT GOODRICH[2]

1. Lyons v. Westinghouse Electric Corp., 222 F.2d 184, 189 (2d Cir. 1955).
2. United States v. Silliman, 167 F.2d 607, 614 (3d Cir. 1948).

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IN THE

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October Term, 1974

JIM L. NAPPER, ET UX.,

Petitioners

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC., ET AL.,

Respondents

Petition For A Writ of Certiorari
To The
United States Court of Appeals
For the Fifth Circuit

Petitioners, Jim L. Napper and wife, Jo Ann Napper, complain of respondents, Anderson, Henley, Shields, Bradford and Pritchard, a partnership of L. W. Anderson, William B. Henley, Jr., Charles O. Shields, Addison Bradford, Jr., William A. Pritchard and C. A. Searcy Miller, each of them sued individually and as member of defendant partnership and petition for the issuance and service of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgments and orders entered in that Court in its Cause No. 73-3746 wherein petitioners were appellants and respondents were appellees.

Notation: Unless otherwise indicated, all emphasis has been supplied by petitioners.

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OPINIONS BELOW

This case was initiated in the United States District Court for the Northern District of Texas on August 23, 1971 (J.A.2)[1] The only judgment or opinion of the District Court was its combined "Memorandum Opinion and Order" (P.A.2-8) dated October 3, 1973. It is unpublished. The judgment (P.A.15) and opinion(P.A.8-13)of the Fifth Circuit are dated September 16, 1974, the opinion being published at 500 F.2d 634. Its per curiam decision denying rehearing (P.A.14-15)is dated January 31, 1975 and published at 507 F.2d 723.

The related Arkansas case of Napper, et ux. v. Anderson, et al. was initiated in the Circuit Court of Pulaski County, Arkansas on June 9, 1971 (P.A. 10), removed to the United States District Court for the Eastern District of Arkansas on July 12, 1971(P.A. 1), and remanded to the Pulaski Circuit Court by order dated May 9, 1973(P.A. 2). The Court on the same date announced "findings of fact and conclusions of law * * * from the bench"(P.A. 2). The Pulaski Circuit Court dismissed the case on November 15, 1973. An appeal to the Arkansas Supreme Court was dismissed on April 29, 1975. No other opinions were rendered by any of the courts in the Arkansas proceedings, Federal or State, and none were published. A petition for certiorari to the Arkansas Supreme Court was denied here on November 18, 1974, No. No.74-381, 419 U.S. 1023(1974)

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1. In referring to the record of proceedings in the courts below, petitioners will employ the following abbreviations: (P.A.), Petitioners' Appendix attached to the rear of this petition; (J.A.), Joint Appendix filed with the Clerk of the Fifth Circuit; (R.), Record of Proceedings prepared by U.S. District Clerk, Northern District, Texas. It should be noted that many of the papers from the latter court are copies of court papers originally filed elsewhere.

Only one opinion has been rendered by trial or appellate courts in the related Texas State Court case of Napper, et ux, v. Johnson and it is published at 464 S.W.2d 496(Tex.Civ.App.1971)(P.A.16-18).

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1974. The Court of Appeals extended the time to petition for rehearing until October 23, 1974. A petition for rehearing was filed on that date, October 23, 1974 and was denied on January 31, 1975. On April 24, 1975 and within 90 days thereafter, Mr. Justice Powell extended the time to petition for certiorari until June 2, 1975, Order No. A-876. On May 29 Mr. Justice Powell further extended the time to petition for certiorari until June 17, 1975, Order No. A-876. The jurisdiction of this Court is invoked under 28 U. S.C.§1254(1).

QUESTIONS PRESENTED

On April 24, 1950, the Supreme Court granted certiorari to consider substantially the same question now presented. Unfortunately, the Supreme Court disposed of the prior case, U.S.v.Munsingwear, Inc.,340 U.S.36(1950) on narrow procedural grounds not present herein and failed to expressly decide the fundamental issue again presented by petitioners' first question:

FIRST QUESTION:

Whether a judgment remanding a case back to the state court, which petitioners without fault on their part, could not have appealed as a matter of law, can, despite the frustration of appellate review, stand as a bar to relitigation of the identical issue by the same parties in another suit originally brought in another federal court; thereby defeating

the right of appeal that is otherwise available in the second case?

SECOND QUESTION:

Did not the Courts below fail to distinguish between the power to act (jurisdiction) and the propriety to act (discretion)? Were not petitioners thereby deprived of the opportunity to invoke the Trial Court's discretionary jurisdiction over pendent claims?

STATUTES INVOLVED

28 U.S.C., §1291:

"Final decisions of district courts. The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C., §1447(d):

"An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."

SUMMARY OF ARGUMENT

.....

1.

.....

By Statute, a remand order is expressly non-appealable. 28 U.S.C., §1447(d). Regardless of whether or not the remand order by the Eastern District of Arkansas contained egregious error, petitioners had no choice but to return to the state courts of Arkansas where their case was finally dispatched without touching the merits in any way.

The dismissal of a case is obviously a more severe remedy than a remand. This is particularly so in the present case where the Texas two year limitation period had already run at the time that the Northern District of Texas entered its dismissal. Because of the difference in the nature of the remedy, Congress has provided, and the federal courts have always allowed, appeals from dismissal orders, even orders dismissing for want of diversity. 28 U.S.C., §1291.

The Fifth Circuit erred in holding that "the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action" (P.A. 13). The authority relied upon, Johnson Co. v. Wharton, 152 U.S.252(1894), failed to distinguish between the two aspects of former adjudication:

(1) Those applications wherein the second suit attempts to defeat the relief granted or denied in the first lawsuit ("claim preclusion" or "classic res judicata").

(2) Those applications wherein the findings of fact and law in the first case are invoked to decide the second case even though the second case does not threaten to impair the relief granted in the first ("issue preclusion" or "collateral estoppel").

The modern rule is to be found in Res., Jmts, 2d, §68.1(T.D.1973):

§ 68.1. Exceptions to the General Rule of Issue Preclusion.

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(a) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action; (p.170)

Obviously, the Eastern District of Arkansas was not attempting to dispose of a case then pending in the Northern District of Texas. His decision could not have had direct effect upon the Texas case. It could only have had collateral effect premised upon a claim that his ruling of "no diversity" is conclusive. Further, it was not necessary to dismiss the Texas action in order to effectuate the relief contemplated by the Arkansas remand order. The general rule of issue preclusion or collateral estoppel should not be applied here because it would frustrate the right to an appeal of the substantive issue on which the case turns, to-wit: whether or not this is an action "where the matter in controversy * * * is between * * * citizens of different States." 28 U.S.C., §1332(a). If the eighty year old Johnson case cannot be distinguished, it should be overruled.

.....

2.

.....

Petitioners based their claim of federal question jurisdiction upon criminal provisions of the Communications Act and the case of Reitmeister v. Reitmeister, 162 F.2d 691(2-N.Y.,1947), a leading authority upon federal jurisdiction, widely cited, holding that a federal cause of action can be based upon a violation of the penal provisions of the Communications Act. A number of other cases support the general proposition. Regardless of whether

or not their federal claim was upheld, it was meritorious and eminently arguable. Pendent jurisdiction therefore existed. "* * * Whether the complaint states a cause of action * * * must be decided after and not before the court has assumed jurisdiction * * *." Bell v. Hood, 327 U.S.678(1946).

The Fifth Circuit plainly erred in holding"there was never any basis of federal jurisdiction sufficient to support pendent jurisdiction***(P.A.15). The error is spelled out so plainly by the cases of Bell v. Hood, supra, United Mine Workers v. Gibbs, 383 U.S. 715(1966), and Hagans v. Lavine, 415 U.S. 528(1974), that the Supreme Court could easily reverse per curiam without briefing or argument.

Pendent jurisdiction is admittedly discretionary jurisdiction and the District Court could have declined to entertain the case. However, even though pendent jurisdiction was brought to the attention of the District Judge, she failed to consider the matter and held that the case must be dismissed "for want of jurisdiction" (P.A. 8).

The District Court's failure to recognize that it possessed pendent jurisdiction deprived petitioners of the opportunity to invoke the District Court's discretion to retain pendent jurisdiction. Webb v. Bladen, 480 F.2d 306(4-Va.,1973). Especially in view of the fact that respondents are claiming limitations, petitioners were deprived of a valuable right by the failure of the District Court to recognize that it held discretionary jurisdiction.

STATEMENT OF THE CASE

FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

Petitioners, who were plaintiffs in the Trial Court, alleged that the case arose under the Communications Act Amendments of 1952, P.L.554, Ch.879, §18, 66 Stats.711, 722, and that the Court had

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"federal question" jurisdiction under 28 U.S.C., §1337. Petitioners also alleged that they were citizens of Arkansas, that defendants were citizens of Texas and that diversity jurisdiction existed under 28 U.S.C., §1332 (R.36-37).

FACTS OF THE CASE

We include a full fact statement in the hope that the Court will desire background information. Frankly, however, few facts are needed to apprehend the nature of the questions presented, particularly the first question. With one exception, the facts stated by the Court of Appeals are correct, but we draw attention to the fact that petitioners originally moved to Arkansas in 1966 (P.A. 17) and the District Judge in Arkansas found the petitioners to be "residents of Arkansas in all respects" (J.A.10).

The Court's statement on rehearing that "plaintiffs cannot complain in good faith they considered themselves citizens of Arkansas, and were surprised by the contrary ruling, for on September 2, 1971, ten days after the complaint was filed, defendants moved to dismiss for lack of diversity" is, we respectfully submit, very misleading. Defendants swore on July 12, 1971 that petitioners "are citizens of the State of Arkansas" (P.A. 1). The motion to dismiss referred to by the Fifth Circuit did not come until after the two year limitations period had run and was a drastic reversal of position calculated to trap petitioners in the wrong court.

PROCEEDINGS-STATE COURTS-FIRST TRIAL

On January 25, 1969, petitioners being in strained financial circumstances, were induced to enter into an oppressive transaction by which they were required to transfer apparent title to their property to one Earl B. Johnson for a fraction of its value. Since that date, they have litigated in an endless succession of courts without relief. The Court of Appeals for the Fifth Circuit was the latest to send petitioners away without reaching the merits of the controversy.

Petitioners' litigation with respect to their property was initiated in the 160th District Court of Dallas County, Texas. A defendants' judgment was reversed on appeal, Napper v. Johnson, 464 S.W. 2d 496(Tex.Civ.App.1971)(P.A. 16), writ of error refused by Texas Supreme Court, "no reversible error." That opinion will serve as a statement of the background facts of this case. During the course of that trial, it was brought out for the first time that a member of the law firm, in which petitioners had been induced to repose their trust and confidence, had made an under-table deal by which they, the lawyers, could and did acquire a one-half interest in petitioners' property.

PROCEEDINGS-EASTERN DISTRICT OF ARKANSAS

On June 9, 1971, petitioners filed in the State Circuit Court at Little Rock, Arkansas, a complaint against the present respondents for legal malpractice and fraud (R.76-82), substantially the same as the complaint filed in this case (J.A.17-26).

On July 12, 1971, Winslow Drummond, attorney for these respondents filed a petition for removal in the United States District Court for the Eastern District of Arkansas in which he swore upon oath that "at the commencement of this suit and at the present time Jim L. Napper and Jo Ann Napper were and are citizens of the State of Arkansas" (P.A.1). It has never been retracted or qualified in any manner and petitioners submit this declaration against interest as prima facie evidence of diversity of citizenship.

Petitioners obtained service upon their Arkansas action under the Arkansas long-arm statute. Immediately after removal of the case, respondents filed their "Motion to Quash" contending that they were not amenable to service under the long-arm statute (P.A.10). Although respondents' motion was the subject of protracted proceedings, it had never been acted upon at the time of the remand order of May 9, 1973, almost two years later (J.A.11).

Petitioners made the following statement to the

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District Court below in their "Brief In Support of Jurisdiction" (J.A. 2). The respondents did not contest it in any way. We offer it for the Court's information as a summarization of those proceedings:

> Shortly after the motion to quash was filed, the Court notified plaintiffs that it planned to rule on the motion without a hearing and gave petitioners ten days to file brief, answer, affidavits and other opposing documents. Petitioners' counsel responded with the proposition that the burden of proof on a motion to quash process is upon the moving party and urged that the respondents as movants had produced no proof in support of their motion.
>
> The Court replied that in its opinion, in a federal court, the burden of proving jurisdiction is upon the plaintiff. Petitioners responded by requesting time in which to effect discovery. Respondents opposed this request on the basis of the contention that the Court could not grant discovery until jurisdiction had been established. Thereafter, the Court advised petitioners that they would be granted time to make discovery. Petitioners filed a request for production of documents and six separate sets of interrogatories. In answer to the requests, respondents refused to make discovery and answered that the Court had no jurisdiction to order discovery. Petitioners filed a motion to compel and asked the award of attorney's fees on the basis that defendants had previously been overruled upon the only contention that they were urging in opposition to discovery. In response to this motion, respondents filed detailed objections to the discovery pleadings, repetitiously contending that everything that petitioners desired to obtain was irrelevant and too time consuming to produce.
>
> The Court set a hearing on the discovery question on about one week's notice. Petitioners' counsel replied that he would be tied up in trial and requested an alternate date. Counset for respondents answered stating that in

his opinion a stipulation of facts could be worked out adequate for the purpose of passing upon the question of long-arm jurisdiction and urged that no hearing on the discovery motions was necessary at that time. The Court instructed the parties to negotiate regarding a stipulation. Petitioners' counsel prepared a proposed stipulation and forwarded it to defense counsel. Defense counsel thereafter prepared their proposed stipulation and served it upon petitioners' counsel. Petitioners' counsel contacted respondents for the purpose of setting up a conference to discuss the discrepancies in the two proposed stipulations. Defense counsel replied by letter stating "if the one I proposed does not meet with your approval, we can just forget it."

Petitioners renewed their request for a hearing upon the motion to compel. The Court replied by letter dated June 22, 1972 calling for the parties to submit briefs and affidavits upon the question of long-arm jurisdiction and stating that it had decided not to allow discovery at that time. "If the Court decides, after reading the briefs and the affidavits referred to above, that an evidentiary hearing on the jurisdictional issues will be necessary or helpful, such a hearing will be promptly scheduled." Petitioners were unable to find any Arkansas authorities in point and engaged in widespread research for comparable cases from other jurisdictions.

The Court retained the matter under advisement until November 1, when it addressed a letter to counsel (R.30) * * * indicating that it might be considering a ruling in favor of plaintiffs. * * * (See also R.96). However, the Court requested that respondents furnish an additional brief before the Court proceeded further. Respondents responded by filing on November 21,1972, a motion to dismiss the case for want of diversity jurisdiction, * * *. Plaintiffs replied that an improperly removed case could not be dismissed, it could only be remanded and urged that the motion was not well taken in any instance.

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Thereafter, petitioners counsel made several inquiries of the Court as to when it might rule and were advised that the Court was tied up with various precedent matters, but that an early ruling would be given. Finally, on March 29, 1973, the Court by letter advised that it had reconsidered "the opinion that an evidentiary hearing was unnecessary" and that such hearing "is hereby scheduled for May 9, 1973 at 9:30 A.M. in Little Rock." The letter stated that evidence would be taken on both the long-arm and the diversity motion.

Counsel for respondents were two hours late to the scheduled hearing and stated that they had not gotten the hearing on their calendar. Obviously they received notice of the hearing because they had submitted a brief on diversity jurisdiction as requested in the letter setting the hearing date. When the hearing commenced, the Court advised petitioners' counsel that he should proceed first of all, solely upon the diversity matter. The only witnesses were the petitioners themselves. At the close of their testimony, the Court remanded the case.

Petitioners' counsel was frankly astounded that a federal court would, alter almost two years, allow a party to impeach his own removal except on a showing so strong that no other disposition is legally permissible. To the contrary, we feel that the Arkansas Federal Court surely erred by holding that people who have admittedly resided in Arkansas almost continuously since 1966 are mere sojourners in a strange land. In Law v. Converse, 419 F.2d 38 (3-Pa.1969), the Court refused to dismiss for want of diversity jurisdiction on motion of the unsuccessful party after a verdict had been filed. As we see it, the Eastern District of Arkansas has permitted that which the Third Circuit forbade.

PROCEEDINGS ON REMAND-ARKANSAS STATE COURT

After they were thrown out of the Federal Court at Little Rock, petitioners promptly presented their case to the State Circuit Court. On November 15,

1973, that Court sustained respondents' "Motion to Quash" holding "There has been no relationship of the defendants, either individually or as a partnership, with the State of Arkansas that would subject them to the exercise of personal jurisdiction over them by this Court." The Court rendered no opinion and cited no supporting authority for its ruling.

An appeal was taken to the Arkansas Supreme Court and a copy of the rules of the Arkansas Supreme Court was secured from the Clerk of that Court. Notice of appeal was given in eleven days although the statute allowed thirty. The transcript was not ready within the prescribed ninety days from the notice of appeal and a thirty day extension was secured from the Trial Court. The transcript was filed on the 108th day. On motion of these respondents, the Arkansas Supreme Court dismissed the appeal. No opinion or memorandum was delivered, but the dismissal was apparently based on a new rule not contained in the pamphlet provided by the Supreme Court's Clerk restricting Trial Court's extension authority. Petitioners urged denial of due process because the appellate court's own clerk contributed to their dilemna and that, in any case, the fact that the notice of appeal was premature coupled with the fact that the transcript was filed within the overall basic time limit made the matter harmless, but the contentions were rejected.

A petition for certiorari addressed to the Arkansas Supreme Court was filed here on October 25,1974, No. 74-381. Certiorari was denied on November 18, 1974, 419 U.S.1023.

PROCEEDINGS AFTER REVERSAL-TEXAS STATE COURT

The case of Napper v. Johnson, reversed by the Texas Court of Civil Appeals was transferred to the 162nd District Court of Dallas County, Texas and retried beginning July 16, 1973. As required by Texas law, the case was submitted to the jury upon special issues or interrogatories. The results were similar to the first trial. Certain issues favored peti-

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tioners and certain issues favored respondents. The Court declared a mistrial and ordered the case to be tried for a third time.

The case was tried again commencing December 16, 1974. The petitioners moved that the Judge be disqualified, but they were overruled. While preparing the charge, the Court remarked that if the verdict was favorable to plaintiffs, he would probably grant judgment N.O.V. The verdict on eleven (11) separate special issues (interrogatories) turned out to be entirely in petitioners' favor. The Court thereafter announced that he had changed his mind, that he would enter judgment on the verdict, and that he would afterwards be inclined to act favorably on a motion for new trial. His Honor pointed out in passing that orders granting new trials cannot be appealed under Texas practice.

Prior to the hearing on motion for new trial, petitioners renewed their motions to disqualify. A partial transcript of the hearing on the various motions is attached hereto (P.A.20-21). When counsel attempted to obtain a hearing on the motions to disqualify, he was ejected from the Courtroom. His Honor then granted a new trial to the respondents. No trial date has been set as of this writing.

PROCEEDINGS-NORTHERN DISTRICT OF TEXAS

As previously stated, the petitioners' complaint is substantially identical to their pleadings in the Arkansas courts. This case was filed August 23,1971 (J.A.2) "as a precaution against having their cause [pending in the Eastern District of Arkansas] dismissed [for want of long arm jurisdiction] after the running of the applicable limitation period"(P.A. 3). The District Court states "Plaintiffs in this cause sought, and received, a stay in the proceedings in this court pending a decision on the issue of diversity jurisdiction * * *" (P.A. 5). The statement is somewhat inaccurate. Defendants swore to petitioners' citizenship and removed the case on July 12, 1971 (P.A. 1) and the only "jurisdictional question" before the Arkansas Court on August 23,

1971 related to long-arm jurisdiction. It was not until November 21, 1972, over a year later and after the Eastern District of Arkansas had indicated a ruling against them that respondents attacked their own affidavit (P.A. 2).

An amended complaint was filed by petitioners on September 25, 1973. By this complaint, petitioners alleged that they relied upon representations communicated to them by respondents from Dallas, Texas over the common carrier telephone system to petitioners at Hardy, Arkansas and Cherokee Village, Arkansas (J.A.19-22). Petitioners alleged that respondents formed a profit splitting deal with the mortgagee, Johnson, and that during their interstate communications with petitioners, respondents omitted to communicate this fact to petitioners. "Such omission tended to create in the minds of plaintiffs the impression that defendants' activities with respect to the transaction were devoted exclusively to the interests of plaintiffs [and were] exclusive of any self interest in the transaction. Such material omission thereby caused such entire communications to be deceptive" (J.A.19-20). Petitioners alleged that thereafter as the 180 day period specified in their agreement with the said Johnson began running out, petitioners employed respondents to solicit a 30 day extension from mortgagee, Johnson. Petitioners alleged that respondents accepted and undertook such employment while omitting to divulge their profit splitting deal with Johnson and again alleged "Such material omission thereby caused such entire communications to be deceptive" (J.A.20-21). They likewise alleged that they were given false or incorrect information regarding the expiration date of the 180 day period, that the same was transmitted by interstate telephone and that the same was deceptive (J.A. 21-22). Defendants' conduct is alleged as constituting legal malpractice (J.A.22-23). Alternatively, petitioners alleged the conduct of respondents to be fraudulent (J.A.23-26).

In support of their diversity allegations, petitioners filed affidavits on November 24, 1971 (J.A. 5-7[1]) and on August 27, 1973 (J.A.12-14). They further rely on the affidavit of respondents'

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attorney Winslow Drummond annexed to the Petition For Removal (P.A.1). These affidavits, which are uncontroverted, set out that since 1966, petitioners have resided almost continuously in Arkansas, have maintained their only regular place of abode there, and have lived, worked, voted and raised their children in Arkansas.

Respondents have filed no answer and no affidavits. They originally urged that inasmuch as petitioners alleged in the complaint that they "own homestead property in Texas" (J.A.4), that "they are citizens and residents of Texas" (J.A.4-5).

Subsequently, respondents moved for dismissal on the grounds that the remand entered by the Eastern District of Arkansas was conslusive upon the diversity question (J.A.7[2]).

The District Court dismissed on October 3, 1973 (P.A.2) and the Fifth Circuit affirmed on September 16, 1974 (P.A.8). Neither the Northern District of Texas nor the Fifth Circuit made any findings on the merits of the diversity question although it was fully briefed and argued by both parties. Instead, both Courts declared the Arkansas rulings to be conclusive. The District Court failed to take any express notice of petitioners' claim of pendent jurisdiction although the matter was duly pointed out to the Court. On appeal, the pendent jurisdiction was again clearly pointed out. The Fifth Circuit took no express notice of the pendent claim in its original opinion, but held on rehearing that "there was never any basis of federal jurisdiction sufficient to support pendent jurisdiction * * *" (P.A.15).

Petitioners here submit that the Courts below erred on both counts.

REASONS FOR ALLOWING THE WRIT

FIRST QUESTION: THE RIGHT OF APPEAL MAY NOT BE UNNECESSARILY FRUSTRATED BY THE ISSUE PRECLUSION DOCTRINE

Every system of laws in existence, and in all likelihood, every system of laws that has existed has had rules against the relitigation of matters previously decided. Unless the Courts have the power to reach a final conclusion in litigation and enforce their conclusions as final, they would be little more than perpetual debating societies.

We inherited the term "res judicata" (literally, a thing adjudged) from the Roman law through the common law. The common law rule was rather narrow. There was no res judicata without the four-fold identities of parties, capacities, subject matter (res) and nature of claim. However, the courts of chancery gave injunctions against repetitious litigation and the splitting of causes. Those courts evolved the rule that once an issue had been fully and fairly decided, it could not be put into litigation between the same parties again.

The merger of law and equity in this country brought about a merger of the rules of former adjudication as applied in courts of law and chancery. Unfortunately, such merger brought on a great deal of loose terminology, confusion of terms and general lack of uniformity. The courts and the writers are prone to refer to the entire field of former adjudication with the term "res judicata," often without specifying what aspects of the doctrine are being referred to. The cases and texts speak of "res judicata","estoppel", "direct estoppel", "estoppel by verdict","estoppel by judgment","collateral estoppel","prior adjudication", "issue preclusion", "claim preclusion", "merger", "extinguishment", "judgment in bar",etc. The law of former adjudication also has numerous branches that are

often confused. We mention them only in passing because they have no application to the case in hand: law of the case, stare decisis, the rule against splitting, and the rule requiring the assertion of counter claims and offsets in the same action. These doctrines also have been loosely referred to from time to time by the term "res judicata." See 46 Am.Jur.2d, Judgments, §§397-399.

The original Restatement of Judgments published in 1942 made an effort to clarify terminology. The field of law relating to the limiting effect of prior judgments was entitled "former adjudication." The term "res judicata" was limited to its classic or common law usage. The term "collateral estoppel" was adopted to describe the conclusive effect of issues previously tried. The Supreme Court has primarily followed the terminology of the Restatement employing the term "collateral estoppel" in several decisions.

Professor Scott, one of the reporters for the original Restatement, expressed misgivings with the use of the term "collateral estoppel" from the outset as being undescriptive. Scott, Collateral Estoppel By Judgment, 56 Harv.L.Rev.1,3(1942). Professor Vestal, who has written extensively on former adjudication developed the terms "claim preclusion" and "issue preclusion," Vestal, The Constitution and Preclusion, 62 Mich.L.Rev.33,34(1963). His terminology has been adopted for use in the second Restatement of Judgments and petitioners will employ it herein submitting that it much more accurately describes the concepts involved and is, therefore, helpful in their understanding and application.

EVOLUTION OF THE PRECLUSION DOCTRINE

The leading case drawing a distinction between claim preclusion and issue preclusion is Cromwell v. Sac County, 94 U.S.351(1876). (First suit: plaintiff sued for interest on certain bonds issued by defendant county; take nothing, bonds not validly issued, plaintiff did not prove coupons sued on

were acquired for value before maturity. Second suit: action on other bonds, same series; plaintiff pleaded acquisition for value before maturity. Held for plaintiff in second case.):

> "But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action." Id.353

Since the plaintiff was not seeking the same relief, the second suit was not precluded. While the prior suit settled the proposition as between the parties that plaintiff could not recover without proving acquisition for value, before maturity, it went no further. Inasmuch as the plaintiff made such allegations in his second suit and he was not seeking to defeat the relief granted in the first suit (he was suing on a different claim--to recover a different res), he was entitled to litigate his case to judgment.

The next significant decision (which the Fifth Circuit held controlling) was Johnson Co. v. Wharton, 152 U.S.252(1894). (Dispute over patent royalty agreement; plaintiff obtained judgment for small amount of royalties accruing during early period; under statute then existing, judgment non-appealable because of the small amount. Plaintiff thereafter sued for substantial amount later accruing; held, first judgment conclusive in second case; non-appealability of former judgment has no bearing.)

Obviously, no subsequent case could be countenanced which threatened to impair the relief previously granted or denied. However, that relief was

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a money judgment for royalties coming due in certain months. The second suit did not threaten the specific relief of the first in any way but the Court took no consideration of any possible distinction and held that the non-appealable prior judgment was conclusive throughout.

The Court declared that "the principle of res judicata" does not depend upon whether the judgment is subject to re-examination in another court. The Court stated that it could find no authority in point and "upon principle," non-appealability should have no bearing. Id. 256,257.

We strenuously contest the Court's conclusion that Congress intended this result by declaring certain cases non-appealable. The converse argument will fit the situation with identical facility and is in fact, much stronger. That is to say, the Supreme Court could just as well have concluded that inasmuch as Congress had expressly provided for appeal where a larger sum was involved as in the second case, then Congress must have intended that the first case may not control the outcome of the second. We suggest that the argument is equally vacuous in both directions. This is the type situation which Congress neither foresaw nor undertook to provide for. The truth of the matter is that practically all of the law of former adjudication is case law. The legislative arm has left the judicial arm free to fashion its own rules concerning former adjudication.

In Johnson, the Supreme Court was free to fashion whatever rule it chose to apply because, as the Court itself pointed out, there was no pre-existing authority in point. The Court chose a harsh rule and it admitted as much. The Court went even further and held that even if the plaintiff had deliberately carved up his case in order to frustrate the defendant's right of appeal, it would still apply the same rule. "Whatever mischief or injustice may result * * * must be remedied by legislation," id.261. Suffice to say that 81 years have passed without Congressional action upon the proposition.

The first Restatement of Judgments was recognized by the Supreme Court in Commissioner v. Sunnen, 333 U.S.591(1947). (First case: taxpayer won decision excluding from income royalties paid to his wife; second case: IRS assessed taxpayer for wife's royalty income in later years; held for IRS). Tax liability for each year was held to be a separate cause of action making classic res judicata (claim preclusion) inapplicable. Collateral estoppel (issue preclusion) was held to be generally applicable to subsequent years, but the Court agreed that collateral estoppel creates no vested rights. The Court concluded that intervening decisions and a substantial change in the legal status of such royalty agreements constituted a compelling circumstance precluding the application of collateral estoppel. Reading Johnson and Sunnen one after the other, one will find a stark contrast in the overall view taken of the theory and limitations of the law of former adjudication.

> "That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remainded substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time * * *.
>
> "And so where two cases involve income taxes in different taxable years, collateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding and where the controlling facts and applicable legal rules remain unchanged.
>
> * * * * * * * * *
>
> "If the relevant facts in the two cases are separable, even though they may be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case. * * * In that situation, a court is free in the

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second proceeding to make an independent examination of the legal matters at issue. * * * Before a party can invoke the collateral estoppel doctrine * * * the legal matter raised in the second proceeding must involve the same set of events or documents and the same bundle of legal principles that contributed to the rendering of the first judgment," id.599-602.

In Sunnen, this Court relied heavily upon §§68, 69 and 70. Res.Jmts., §69(2), provides as follows:

> "Where a party to a judgment cannot obtain the decision of an appellate court because the matter determined against him is immaterial or moot, the judgment is not conclusive against him in a subsequent action on a different cause of action." Res.Jmts.,§69(2).

Section 70, Comment d., also states that the rules concerning the inability of a party to appeal are applicable both to questions of law and of fact.

The first Restatement made no explicit provision concerning preclusion when the former adjudication was declared non-appealable by statute, but we can see no difference in theory or practice whether the appeal is frustrated because of mootness or an express statutory provision. The underlying premise is the same. The right of appeal is a valuable right. To treat a non-appealable decision as preclusive in an appealable case frustrates the right of appeal.

Section 69(2) was held controlling in Allegheny Co. v. Maryland Cas.Co., 146 F.2d 633(3-Pa.1944), cert.den.325 U.S.855(1945). (First case: judgment against taxpayers seeking to enjoin payment for voting machines, payment made while appeal pending, appeal dismissed as moot; second case: county sued for defects in machines; held, no preclusion). Relying on §69(2), the Third Circuit declared that, inasmuch as the right of appeal was frustrated in the first suit, the judgment in that case did not preclude the second suit.

However, §69(2) was expressly rejected by the Eighth Circuit in U.S. v. Munsingwear, 178 F.2d 204 (8-Minn.1949), (Suit by government for injunction and penalty for price control violations: trial court severed tried the injunctive claim, denied relief; appeal dismissed as moot when price controls lifted; trial court then dismissed damage counts on grounds that prior judgment "bars further proceedings;" held, preclusion is applicable). While the Eighth Circuit discussed several Supreme Court decisions containing widely generalized statements concerning former adjudication, the only case near in point and the case upon which the Court placed primary reliance was Johnson Co. v. Wharton, supra:

> "We are satisfied that neither the District Court nor this Court would be justified in altering the doctrine of res judicata as it has thus far been enunciated by the Supreme Court," id.209.

The dissent vigorously argued in favor of the Restatement rule urging that such rule had received inferential approval of the Supreme Court in Sunnen. It was urged that none of the Supreme Court's decisions justified "any such literal and justice thwarting restrictiveness as has been done here."[2]

A conflict with the Third Circuit decision in Allegheny was claimed. Certiorari was applied for and granted to consider the following question:

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2. The dissent made another point which is wholly applicable to petitioners' case. It was urged that in filing the original motion to dismiss, the defendant had a duty to disclose that to the appellate court that it was planning to urge the dismissal as conclusive in the other suit. The dissenting judge urged that even assuming a lack of bad faith, a litigant still should not be permitted to profit from misleading the court and that defendant was thereby "estopped" to assert the dismissal order as being conclusive of the other suit. (cont'd on following page)

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"Whether a judgment denying an injunction, the appeal from which has been dismissed as moot, can, despite the frustration of appellate review, stand as a bar to relitigation of the identical issue by the same parties but in a suit for damages." (Pet.Cert. p.2, U.S.v.Munsingwear, No.23,24,O.T.1949, U.S.Sup.Ct.)

The propositions argued were as follows:

" **The Government's Statutory Right to Appeal from the Denial of the Injunction Having Been Frustrated Through No Fault of Its Own, the Trial Court's Unreviewed Judgment Does Not Bar Relitigation of the Same Issues in the Treble Damage Actions**

" ***A. Inherent in the Doctrine of Res Judicata Is the Principle That a Prior Adjudication Is Not to Be Deemed a Bar to Relitigation When, as Here, the Injustice Which Would Follow Upon Application of the Doctrine Outweighs the Reasons for Its Invocation.***

* * * * * * * * *

" ***B. The Effect of the Decision Below Is to Deny an Appeal in a Case in Which Congress Intended Appellate Review to Be Available.***"

(Ptr.Br.pp.8,22, U.S. v. Munsingwear, Ibid.)

(cont'd from preceding page)

These respondents made no effort to notify the Arkansas court that they planned to seek dismissal of the Texas case on the strength of the Arkansas Court's remand order. That Court might have ruled differently if it had been so notified. Obviously, dismissal is a more severe remedy than remand. The proposition is particularly applicable considering that defendants filed a motion in the Eastern District of Arkansas not for remand but instead moved "that this action ought to be dismissed for want of jurisdiction"(R.66,J.A.8[1]). Even though the Arkansas Court refused to dismiss and limited its specific relief to a remand, the Fifth Circuit has held that his order makes dismissal of another case pending in another district mandatory. This, petitioners submit is the type of incongruous over-application of the law of former adjudication against which this Court warned in Sunnen declaring that the doctrine "must be used with its limitations carefully in mind so as to avoid injustice."

The question presented and the propositions argued differ little from that which petitioners now present.

Unfortunately, the Supreme Court did not reach the real question as we see it and as the Eighth Circuit saw it; that is, whether or not Johnson is outmoded authority and whether the Restatement contains the modern rule. Instead, the Court chose to base its affirmance on the lack of skill, foresight and diligence of counsel for the government in failing to ask the appellate court when it mooted the prior appeal to vacate the judgment below; case reaffirmed.

Inasmuch as there was no similar procedure available to your petitioners, the precise holding by the Supreme Court in Munsingwear has no present application.[3]

However, petitioners feel that the implications of Munsingwear are in their favor. The Court took notice of the conflict between Johnson and the Allegheny-Restatement rule. While it declined to resolve the conflict, it did declare it to be the "'duty of the appellate court'" to vacate the decision below

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3.

Substantial dissatisfaction with the decision has been registered. It has been criticized as setting a procedural trap for the unwary. If the appellate court had a "duty" to dismiss in the first case, was the Court not exalting form over substance? Would it not have been better to apply the equity rule calling for the Court to consider as having been done, that which should have been done? Obviously, the government's failure to make the proper motion was a simple oversight. If any prejudice or imposition had resulted to the opposing party, the offending party should be visited with the necessary consequences of its oversight. Lacking any indication of imposition to the opponent or grounds upon which the Court in the prior appeal could have denied the motion, it appears that the goverment's cause of action was declared forfeit simply as a penalty for failure to exercise sufficient foresight and diligence. See Developments-Res Judicata, 65 Harv.L. Rev.818,847-848(1952) Hart & W.,Fed. Ctsll3(2d.ed.1973), Res.Jmts.,2d,184(T.D.1973)

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when it dismisses for mootness.

> "That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance."

From this statement, petitioners find the clear inference that the Supreme Court does find the right of appeal to be a valuable right and does feel that a party is entitled to relief from preclusion when review is "prevented through happenstance." The present happenstance is that respondents secured a ruling upon the diversity issue in a non-appealable proceedings. Certainly, non-appealability does not affect the judgment's vitality as a claim preclusion, but issue preclusion presents a different situation. As stated in Sunnen, no one has "vested rights" in erroneous decisions. "Having been frustrated through no fault of * * * [their] own, the * * * unreviewed judgment does not bar relitigation of the same issues * * *" (Ptr.Br.p.8, U.S. v. Munsingwear, ibid.).

After 30 years, the first Restatement is being replaced by Restatement of Judgments, 2d. One of the most valuable advances is the adoption of Professor Vestal's terminology, "claim preclusion" and "issue preclusion." This new, more descriptive terminology should go far in clarifying the law of former adjudication. Until definitive and well understood terminology is adopted, it is not possible to have definitive and well understood laws. While the first Restatement gave specific consideration only to the frustration of a prior appeal on account of mootness, Restatement, 2d lays down a more inclusive rule:

> "**§ 68.1. Exceptions to the General Rule of Issue Preclusion.**
>
> **Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:**

"(a) **The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment by an appellate court in the initial action;** "Id. 170

*** *** ***

"Comment on Clause (a):

"*a. Inability to obtain appellate review.* As noted in § 68, Comments *h* and *i*, the availability of appellate review for the correction of errors has become critical to the application of preclusion doctrine. If appellate review is unavailable because the party who lost on the issue obtained a judgment in his favor, the general rule of § 68 is inapplicable by its own terms. Similarly, if there was an alternative determination adequate to support the judgment, the rule of § 68 does not apply.

"There is a need for an analogous exception to the rule of preclusion when the determination of an issue is plainly essential to the judgment but the party who lost on that issue is, for some other reason, disabled from obtaining review as a matter of law. Such cases can arise, for example, because the controversy has become moot, or because the law does not allow appellate review of the particular category of judgments." (pp. 171-172)

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"REPORTER'S NOTE

"This Section is new. It is designed to replace §§ 69-72 of the first Restatement and to group under one heading the various bases for exceptions to the preclusion doctrine.

"*Clause (a)* is drawn from § 69 of the first Restatement. Part of former § 69, dealing with the effect of an appeal, is now covered in Comment *o* to § 68. The remainder of former § 69, dealing with inability to obtain appellate review because of mootness or immateriality, has furnished the basis of a broader exception for situations in which as a matter of law, review is unavailable, and Comment *a* links this exception to the pervasive importance of reviewability in the application of preclusion doctrine.

"As an example of a limitation on the availability of review not involving mootness, a number of jurisdictions limit appeals to cases involving more than a specified amount or value. See 4 Am. Jur. 2d, Appeal and Error §§ 20-23 (1962)" (p.183)

Surely, if the black letter rule being promulgated by the American Law Institute is to be followed, there is error in the decision of the Fifth Circuit. Respondents have made no attempt to distinguish the new §68.1, but urged instead that the Circuit Court was obligated to follow the Supreme Court's decision in the Johnson case. Clearly, the ALI considers Johnson to be outmoded. Petitioners urge likewise and would submit that the writ should be granted to explore the proposition. We are at a loss why the Fifth Circuit failed to even mention the new §68.1. According to Shepherd's Citator, the federal courts have previously cited Johnson as controlling authority only one time in this century. That one time was the Eighth Circuit's Munsingwear decision, supra. The case is out of step with modern day concepts.

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and with rationality." Ashe v. Swenson, 397 U.S.436, 444(1970).

Ashe was, of course, a criminal case and there are significant differences between civil and criminal actions[4] but the comment upon the era which spawned the Johnson case is most descriptive. Ashe v. Swenson was an admitted extension of the law of issue preclusion. Restatement, 2d, illustrates many instances in which the courts are extending issue preclusion and forbidding the relitigating of issues that were previously decided, fully and fairly. However, there is and must be a concurrent movement away from the rigid and overly technical approach to the field employed before the turn of the century. The doctrine must be applied with its limitations carefully in mind, Commissioner v. Sunnen, supra. One of those limitations is that the right of appeal should not be frustrated by invoking issue preclusion with respect to a prior non-appealable judgment.[4]

4.

When this case was orally argued in New Orleans, the Honorable Chief Judge mentioned Ashe v. Swenson and stated that at least insofar as criminal law is concerned, non-appealability seems to have no bearing, because the prosecution never has the right of appeal, but yet under Ashe v. Swenson, it may be bound by "collateral estoppel."

The situation is not at all comparable. It is the double jeopardy clause and not the law of former adjudication which frustrates the prosecution from taking an appeal. In the case at hand, the crux of the deprivation is the introduction of a nonappealable judgment into a case where the right of appeal would otherwise be available, thus frustrating an appeal of the underlying issue upon which the case turns.

The objective of a criminal case is punishment thereby placing the burden upon those who would inflict punishment to make out a clear case for the exaction of the penalty. In a criminal case, a lone human being is pitted against the power and prestige of the goverment in a contest for human liberty. Because the contest is basically unequal, the Constitution has placed various handicaps upon the prosecution, one of which is the double jeopardy provision which provision denies the right of appellate review in all cases after jeopardy has attached. Because of the inherent differences, few comparisons can be drawn from criminal practice.

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THE DIVERSITY CLAIM IS MERITORIOUS

Neither the Fifth Circuit nor the Northern District of Texas would consider the merit of the Arkansas "no diversity" ruling. Both declared that they were prohibited from doing so by the law of former adjudication. We will address the proposition but briefly.

Petitioners moved away from their home in Dallas, Texas during the early part of 1966 (P.A. 17) and at the time of filing of this lawsuit had continuously lived in Arkansas for over five years; there maintaining their only place of residence, voting, keeping their children in school, attending church, banking and licensing their automobiles (J.A.5-7[1], 12-14). The only exception is that during a six month period commencing about Thanksgiving of 1969, they stored their household goods in Arkansas and journeyed to Colorado and Texas where Mr. Napper looked for work. During this six month period, there is no evidence that they set up a permanent household elsewhere and the temporary nature of their absence from Arkansas was attested by their leaving their possessions behind them (J. A.12-14). The Arkansas Court acknowledged that Mr. Napper "is a resident in all respects in Arkansas" (J.A.10).

In remanding the case, the Eastern District of Arkansas primarily emphasized that the petitioners, Mr. and Mrs. Napper, still owned a house in Dallas, Texas, which they had rented out and that they had conceded that at some date in the future, when circumstances would allow, they would like to return to Dallas (P.A.11,J.A.9-10). A "floating intention" to return whence one came is an insufficient basis to maintain citizenship at the previous residence.

> "From a practical standpoint, citizenship of the parties in many diversity cases is beyond dispute. If the full facts are that a man has lived and worked in Connecticut for three or four years before suit is filed and can testify that he has no present intention of moving anywhere else to live, no one is going to make

much mileage out of a claim that he is not a citizen of Connecticut for diversity purposes." Lavine & H., Man.Fed.Prac., 44-45

See also Gilbert v. David, 235 U.S.561(1915) and Hardin v. McAvoy, 216 F.2d 399(5-Ga.1954).

One of the lesser recognized values of the right of appeal is that its mere existence imposes discipline upon trial courts. We believe that the right of appeal has a definite prophylactic effect. Mapp v. Ohio, 367 U.S. 643(1961). Where appeal is available, the trial court is under compulsion to rule in accordance with the law. In a non-appealable proceeding, the temptation can arise to rule in accordance with one's own subjective notions.

This is a case of legal malpractice, a case which a judge might be inclined to regard as both "sticky" and contentious. We make no accusations against the Honorable Judge of the United States District Court for the Eastern District of Arkansas. He made a visible effort to be both considerate and cordial toward petitioners and their counsel. All we know is that the minds of judges like the minds of other humans are subject to subtle influences. Certainly, a competent and experienced federal judge knows that remand orders are non-appealable. Whether the desire to get rid of a "sticky" case influenced the Court's ruling in any way, we do not know. We do know and do here point out that the temptation to issue a non-appealable remand order and clear his docket of a case which he might have regarded as personally distasteful was obviously present.

JOHNSON CO. V. WHARTON WILL NOT STAND UP TO ANALYSIS

The Johnson decision contains several obvious weaknesses:

(1) Specious reasoning: Of one thing we are sure, Congress never foresaw the Johnson case and and had no intent at all as to the issue preclusion effect of a non-appealable judgment. Much stronger arguments as to the supposed intent of Congress can

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be made in the opposite direction. Visualize the following argument of counsel:

Argument Favoring Preclusion:

Congress provided in plain language that judgments of less than $500[5] are non-appealable. Congress placed no limitations upon such judgments. It necessarily follows that Congress intended none. This prior $400[5] judgment was just as valid, final and enforceable as a $6,000 judgment. One of the attributes of a valid, final and enforceable judgment is that the issues as necessarily found therein are conclusive between the parties. It must, therefore, be necessarily concluded that Congress intended that the $400 judgment requires that judgment also go for the plaintiff upon his later claim amounting to $6,306.[5]

Argument Opposing Preclusion:

Counsel has read the intent of Congress exactly backwards. He is piling an inference upon an inference. Of course, the $400 judgment is valid, final and enforceable. The plaintiff has collected his $400 and he may keep it. It is not involved in this case. We do not read the intent of Congress by inference. We read it from the plain language of the statute. Congress intended that judgments in excess of $500 are appealable. The statute on its face so provides. Therefore, Congress must have intended for this latter claim for $6,306 to be subject to an appeal. The intention of Congress to allow an appeal in this case may not be frustrated by invoking as conclusive a prior non-appealable judgment for only $400.

To our way of thinking, the second argument has far greater appeal than the first because it gives

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5. The opinion states that the second judgment was for $6306 but it fails to mention the amount of the prior judgment or the statutory minimum for appealability then in effect. The first two figures given above are hypothetical.

the appearance of a far sounder, more reasonable and just resolution of the competing considerations involved. However, let us be frank and practical for a moment. Let us call a spade a spade. The facts are that it is extremely doubtful if Congress had any intent whatever. The lawmakers simply did not envision or consider the problem presented in Johnson. The arguments in both directions concerning Congressional intent are specious because Congress had none.

(2) No supporting authority: Unable to find any cases in point, the decision went off on a few generalized statements then in vogue emphasizing so-called "res judicata" as a mechanical and monolithic rule admitting no exceptions and recognizing no countervailing considerations, the "brick wall" approach.

(3) Cromwell case misread: The decision quotes extensively from Cromwell, but only from its dicta. The above quotation from Cromwell, which was the real holding of the case, was ignored. Obviously, Cromwell was not cited for its result, for that result was a ruling of "no preclusion." Any statement found in Cromwell as to when preclusion applies was, by definition, only dicta.

(4) Issue Preclusion confused with claim preclusion: Clearly, Johnson was identical to Cromwell to the extent that both were cases of issue preclusion only. However, Johnson drew no distinctions and called it all "res judicata." The failure to distinguish the dicta from the results of Cromwell reinforces the premise that Johnson failed to recognize the important distinctions between issue and claim preclusion.

(5) Failure to discuss necessity: A non-appealable judgment must, of necessity, constitute a claim preclusion. Otherwise, it would not be a truly final judgment. If not, it would be available to the losing party to go elsewhere and seek to defeat the very relief (recovery, res) that was awarded. On the contrary, issue preclusion is a non-necessary aspect of a judgment in the sense that it goes beyond

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the relief specifically awarded. Please forgive the repetition, but the point is essential. The dividing line, the watershed between issue preclusion and claim preclusion is the question of what relief (recovery, res) was specifically awarded in the prior judgment. While the application may be difficult in certain cases, the test is exceedingly simple. Beyond the specific relief (recovery, res) of a judgment, the law, in furtherance of the policy against repetitious litigations, may give the judgment collateral effect (hence, "collateral estoppel"). However, this latter aspect of a judgment is by definition, a case of issue preclusion as opposed to claim preclusion.

Returning to the caption of this sub-section, while claim preclusion is a necessary (emphasis: necessary) element of a final judgment (otherwise, it cannot really be final), issue preclusion is never (emphasis: never) a necessary element of a final judgment. Cromwell v. Sac County, supra; Commissioner v. Sunnen, supra.

The Johnson decision wholly failed to discuss necessity. Instead, it jumped to the conclusion that issue preclusion was the necessary effect of a non-appealable judgment. Sunnen holds that issue preclusion is not always, in every instance, the necessary result of a final judgment. In that case, preclusion was refused because of subsequent events. While issue preclusion is, as a general rule, the desirable result, any contention that issue preclusion is, in all cases, the necessary result of a final judgment bodaciously overstates the matter.

(6) Indirect relief that could not have been given directly: In 1894 the statute, as we understand, prohibited the appeal of judgments under $500. Assume that the first judgment in Johnson had been for $6,706 and a proviso added to the judgment that no appeal would be permitted. Obviously, the proviso would be held void and the appeal allowed as if the proviso were not there. The trial court had no power to impose such a condition. But, this is exactly the indirect effect of the Johnson case. A judgment of say, $400 was parlayed into a

non-appealable total award in the first and second judgments of $6,706 ($400, plus $6,306). If the law is logic, then a non-appealable judgment cannot indirectly award in excess of $500 because the law prohibits non-appealable direct awards in excess of this sum. The result reached in Johnson just doesn't make good sense.

THIS CASE INVOLVES COLLATERAL APPLICATION OF THE ARKANSAS JUDGMENT

We have previously pointed out the loose terminology and the lack of uniformity which plagues the law of former adjudication. The Fifth Circuit has termed this to be a case of "estoppel by judgment * * * accurately termed 'direct estoppel.'" (P.A.13, fn.4). Analysis reveals this statement as no more than further terminological morass. The motion made by respondents in Arkansas was that "this action ought to be dismissed" (P.A.2). The order of the Arkansas court was: "It is ordered that this case be, and it is hereby, remanded to the Circuit Court of Pulaski County, Arkansas"(P.A.2).

This was all of the relief which the Arkansas Court undertook to render. He ruled only upon the case that was then pending before him. He made no ruling running to the merits of the underlying cause of action and respondents had asked for none.[6] He made no ruling with respect to the present case which was pending in Texas and respondents asked for none.

Furthermore, inasmuch as the only relief granted by the Arkansas Court was to remand that case there pending to the State Court of Arkansas, it is apparent that nothing which the Northern District of Texas can do or which petitioners have asked the Texas Court to do can possibly affect or limit or impair the specific relief granted by the Arkansas

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6. In fact, respondents have defended this action of legal malpractice for nigh onto four years without ever filing an answer and never giving a scrap of discovery.

Court. If the Arkansas judgment is to have any effect whatever in Texas, the effect must be indirect or collateral. Insofar as this case is concerned, it represents torture of the English language to say that this is a case of direct estoppel rather than collateral estoppel.

Clearly, the present case is one of issue preclusion, not claim preclusion. This is primarily true because nothing which the Texas Court might do or which it has been asked to do can limit or affect or impair the relief granted in Arkansas. The cases cited by the Fifth Circuit itself illustrate the terminological problem.

In Myers v. Ampex, 491 F.2d 1103(5-Tx.1974), it is stated that "the Western District of Oklahoma previously had dismissed an identical action for failure to state a claim upon which relief can be granted. In its second opinion, Myers v. Ampex, 498 F.2d 1092(5-Tx.1974), the Court stated "the doctrine of direct estoppel bars the claim."

Petitioners agree. Myers is clearly a case of claim preclusion. There, the prior judgment went to the entire underlying dispute between the parties. The Oklahoma Court held "Your pleadings entitle you to no relief." If the defendant had filed a motion for summary judgment, that court would have granted a take nothing judgment. If the prior court had heard the evidence, he would have directed a verdict. His ruling destroyed the entire dispute between the parties. His ruling thus precluded the same claim from ever being filed again in another court. Ergo, claim preclusion.

In contrast to petitioners' case, if Myers had been allowed to sue in the Texas Court, the Texas judgment sought by Myers would necessarily have impaired the relief granted in the Oklahoma Court because the Oklahoma Court granted relief which ran to the very heart of the case. Thus, by necessity, we have claim preclusion, not issue preclusion. If "direct estoppel" is to be equated with claim preclusion or classic res judicata, then we agree that Myers is a case of direct estoppel.

Granted that the Arkansas Court based his remand order upon a finding of no diversity, this does not obscure the fact that all he undertook to do was to remand "this case" to the Pulaski County Circuit Court. There is a clear distinction between the judgment given and the findings which lead to a judgment. Where the subsequent case threatens the relief granted formerly, there is a case of claim preclusion. Otherwise, there can be no case except one of issue preclusion. If it is only the issues determined in the first case that are being given effect in the second case, then, unless we are to slaughter the language, the first judgment is being given collateral effect rather than direct effect. The proposition is irrevocably true because the first judgment does not encompass the relief sought in the second case. Conversely, in Myers, the court by necessary implication ruled that "these pleadings will perpetually fail to state a cause" and gave relief not only to "this case" but gave permanent relief against the same pleadings wherever they may appear. Ergo, claim preclusion attached to those pleadings. The same appears to be true of Estevez v. Nabers,219F.2d 321(5-La.1955). The opinion there states that the first suit was "dismissed on the ground that there was no justiciable controversy" and further states that "the first action having held the complaint was defective in failing to allege a controversy of a justiciable nature, we may not consider the correctness of that decision on the facts there alleged."

The Estevez opinion fails to disclose the particulars of the complaints ruled upon, but we presume that in the first case, the court did not dismiss upon any narrow procedural grounds or upon grounds of prematurity or defect in parties, but it went further and held that it had no power or jurisdiction to review exclusion orders issued by the Immigration Service either then or ever. If this was the gist of the original ruling, then the second case was a direct attack upon the relief granted in the first and we have another case of claim preclusion, not issue preclusion.

The slipperiness of the concepts being discussed

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is illustrated by the dissent of His Honor, Judge Rives (who wrote the opinion below), in Weissinger v. U.S., 423 F.2d 795(In banc, 5-Fla.1970), where Estevez was cited in the opposite direction--that is, a contention of "no preclusion" was there made on authority of Estevez, while Estevez is now cited as authority for application of preclusion. Relying on Estevez, it was urged:

> "all that the district court could properly mean by the words 'with prejudice' [in the prior action] was the plaintiff could not again contest the issues of whether a demand was necessary, and, if so, whether one had been made. The words * * * do not show that the claim or cause of action is barred."

Likewise, all that the Arkansas Court could properly mean was that he was disposing of the case or proceedings in his Court. He did not rule upon a claim or cause of action pending in another court. His ruling, if it is to be applied in another court, can only have collateral effect. Clearly, this is a collateral estoppel which "must be used with its limitations carefully in mind so as to avoid injustice," Commissioner v. Sunnen, supra at 599.

The term "direct estoppel" is discussed in Res. Jmts., §45, Commend d, and cross reference is made to §49, Comment b, for an illustration:

> "If the action was dismissed because of the nonjoinder of a third person as defendant, and the plaintiff thereafter brings an action on the same cause of action without joining the third person, the plaintiff is not entitled again to litigate the question whether the third person was a necessary party."

We do not argue with that definition of "direct estoppel." Direst estoppel as there employed is synonymous with claim preclusion, not issue preclusion. To allow the second suit would be to allow an attempt to defeat or impair the relief granted in the first. Clearly, this is impermissible, but these petitioners make no such attempt.

THE CASE IS BEING SACRIFIED ON
THE ALTAR OF RHETORIC

While the terminology differed considerably, the distinction between the relief afforded (either granted or denied, denial amounting to a grant of relief to the opponent) and the findings of fact and conclusions of law forming a basis for that relief was clearly spelled out in Cromwell v. Sac County, supra. Cromwell thereby sets out the difference between claim preclusion and issue preclusion although those terms were not employed. Primarily, the distinction is whether or not the plaintiff seeks to impair the relief afforded in the first case. While the test is stated in many places, it was forcefully spelled out in McNellis v. First Fed. S&L Assn., 364 F.2d 251(2-N.Y.1966),cert.den.385 U.S.970,1967.

"'The decisive test is this, whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second.'

"As indicated above, the state action here determined that the two $62,000 payments could not be recovered by the trustees; success in the action now before us could not 'destroy or impair' that determination." McNellis v. First Fed.S&L Assn., 364 F.2d 251(2-N.Y.1966),cert.den.385 U.S.970, 1967.

"A judgment in one action is conclusive in a later one, * * * when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first. Cromwell v. County of Sac, 94 U.S.351

* * *. "The distinction, though elaborated with special emphasis in many judgments of the Supreme Court * * * is not the doctrine of that court alone.

* * * * * * * * *

> "The decisive test is this, whether the substance of the rights or interests established in the first action will be destroyed or impaired by the prosecution of the second. * * *," Schuylkill Fuel Corp. v. Nieberg, 165 N.E.456 (N.Y.1929)(Per Cardozo, C.J.).

Schuylkill quoted and cited as controlling: Moreno v. Marbil Productions, 296 F.2d 543 (2-N.Y. 1961).

The test was easy to apply in Cromwell. It is perhaps most difficult to apply in cases of dismissal such as Myers, Estevez and Napper. In order to decide whether claim preclusion or issue preclusion is to apply, it is necessary to analyze the nature and extent of the relief granted in the prior judgment. Sometimes, in order to determine what relief was granted, it is necessary to look at the pleading upon which the Court ruled and otherwise view the ruling in context. Please excuse the repetition, but the point is crucial. The Arkansas Court granted no relief beyond the return of that particular case (i.e., the proceedings numbered L.R. 71-C-124) to the Court below. Anything else that was said or done was a mere finding upon which the grant of relief was made. If the Arkansas judgment is to be given any further effect, the English language defines that effect as collateral.

Like Cromwell, Johnson Co. v. Wharton was a case in which it was easy to distinguish issue preclusion from claim preclusion and the question was one of issue preclusion only. However, the Supreme Court in accordance with the practice of the day labeled it all as res judicata. The terminological failure to identify the two separate doctrines led to the Court's failure to consider whether they should be treated differently.

Congress intended for judgments less than $500 to be non-appealable, the Court declared. From this sound premise, the Court jumped to the conclusion that Congress intended a $400 judgment to conclusively require the entry of a judgment of $6,306. What a complete non sequitur! Consonant with too many

decisions of that era regarding former adjudication, the Supreme Court became so enmeshed with fine-spun theories and with obscure terminology, that it failed to recognize the fundamental distinction involved.

Certainly Congress intended or should have intended that there could be no subsequent lawsuit in which the plaintiff's right to recover $400 could be questioned, regardless of non-appealability. However, the holding that the $400 judgment controlled the claim for $6,306 was, we suggest, brought about because the Court had lost sight of the distinction between issue preclusion and claim preclusion.

If this Court will lay aside the "19th centruy pleading book" case of Johnson Co. v. Wharton and look at the case in bar "with realism and rationality," Ashe v. Swenson, supra, it will be plain that petitioners' case is likewise being immersed in the quick sands of terminology whereas if a commonsense approach is taken, petitioners must prevail.

However the doctrines might be labeled, however fine the theories may be spun, it is obvious that this case only concerns the collateral effect of the Arkansas judgment and that petitioners are not here attempting to attack or restrict the relief specifcally afforded in the non-appealable Arkansas order. It borders upon the ridiculous to assume that the Arkansas judge was attempting to control the outcome of a Texas case. Label this case as you will, as preclusion, as estoppel, either direct or indirect (collateral) or call it a late-for-breakfast case, it makes no difference. No amount of relief in this case will infringe upon the relief awarded in Arkansas or deprive respondents of any "vested rights" (Commissioner v. Sunnen, supra) that may have accrued to them by reason of that order.

If the Supreme Court will pierce the veil of terminology and look at the true nature of the case in bar, it will agree that there is no valid basis beneath the terminological differences for the frustration of the right of appeal, granted by Congress with respect to the present case.

PETITIONERS ARE BEING DEPRIVED OF A VALUABLE RIGHT OF CONSTITUTIONAL PROPORTIONS

The right of appeal as an integral part of the federal system was inferentially recognized by the Constitutional provision creating a Supreme Court "with appellate jurisdiction." Congress and the courts themselves have the right to regulate and limit jury trial from the federal system. But we do not think they can abolish appeals any more than jury trial. To do so would, in effect, abolish the Supreme Court itself.

On the other hand, respondents have no Constitutional right to assert preclusion by former adjudication, "a doctrine judicial in origin." Commissioner v. Sunnen, supra,597. If the right of appeal is rooted in the Constitution, it should not be defeated by an overzealous application of the lesser principle of collateral estoppel.

Griffin v. Ill., 351 U.S.12(1956), held that due process does not obligate any state to provide the right of appeal. Even so, we urge, as above, that the federal system must provide for an appeal. It went on to hold appeal sufficiently fundamental that it may not be denied on the basis of unmeaning ful distinctions. To clothe a non-appealable order of remand with the armor of preclusion irrevocably serves to frustrate appellate review of a dismissal, even though the law plainly allows an appeal where a case is dismissed for want of diversity. This, we submit, is the same type of unmeaningful distinction condemned in Griffin v. Illinois.

> "When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. ***," Lindsey v. Normet, 405 U.S.56,76-77(1972).

On authority of Lindsey, it is presented that the law of former adjudication may not be applied so as to arbitrarily or capriciously frustrate the right of appeal. Any other application traverses Constitutional safeguards. The case of Garland

Co. v. Filmer, 1 F.Supp.8,12(1932), supports the same proposition:

> "Were there no claim that plaintiffs' rights under the Constitution of the United States had been invaded, the plea of res judicata would be a complete defense to these cases.* * * If, however, there is no right of appeal upon this federal question from the highest court of the state to the United States Supreme Court, the judgment * * * may not be pleaded as res judicata in the present cases. A determination of a federal constitutional question by a state tribunal is not conclusive if there is no right of appeal to the federal courts."

It has numerously been held that the law of former adjudication must yield when it comes in conflict with laws and principles of greater weight. Kalb v. Feurstein, 308 U.S.433(1940), England v. Medical Exrs., 375 U.S.411(1964). In N.L.R.B. v. Denver Trades Council, 186 F.2d 326(10-Col.1950), it was held that the doctrine of former adjudication could not prevail where it conflicted with the Congressional intention that disputes be decided in the first instance by the N.L.R.B. The proposition was inferentially upheld by this Court's affirmance. N.L.R.B. v. Denver Trades Council, 341 U.S.675(1951). See also Spilker v. Hankin, 188 F.2d 35(C.A.D.C.1951).

THE QUESTION PRESENTED IS PURELY ONE OF FEDERAL LAW

While the law of former adjudication is a matter of general law, it is to be pointed out and emphasized that the question presented inquires only if the federal court has jurisdiction of the case. Thusly stated, the question is peculiarly one of federal law for the federal courts alone have the power to determine their own jurisdiction. Smith v. Sperling, 354 U.S.91,95-96(1957). The question presented is thus narrowed:

Must a federal court in passing upon a question of diversity jurisdiction give conclusive effect to

a non-appealable remand order previously issued by another federal court?

In answering this question, the Supreme Court is free to declare the rule which it thinks will best serve the federal policies involved without regard to the general law. We would hasten to point out that we have never challenged the rights of the courts below to weigh the decision of the Arkansas Court for its persuasive effect. All we urge here is that it should not be given conclusive effect because the right of appeal, a valuable right if not a Constitutional right, will be frustrated.

When respondents first urged upon the Northern District of Texas that the order of the Eastern District of Arkansas had deprived it of jurisdiction, petitioners' counsel went to the books expecting to find a "white horse" case for the subject of diversity jurisdiction has been much litigated. Suprisingly, we found only two cases. Neither respondents nor the courts below have found a one. Both cases found are favorable to petitioners.

In Hellebrand v. Hoctor, 222 F.Supp.81(E.D.Mo. 1961), the Court emphasized that diversity must be determined as of the date each successive complaint is filed. It, therefore, concluded that the dismissal of the first suit for failure to present evidence upon the diversity claim was not "res adjudicata" in the second. In view of the policy that federal courts must continuously re-examine their jurisdiction, the affirmance of the case on other grounds implies approval, Hellebrand v. Hoctor, 331 F.2d 453(8-Mo.1963). The case of Wm.Kalivas Const.Co. v. Vent Control,Inc., 325 F.Supp.1008 (W.D.Mo.1970), involves a similar claim and an identical ruling.[7]

7.

Apparently the Fifth Circuit undertook to distinquish Hellebrand and Kalivas in the final paragraph of its opinion stating "plaintiffs had the burden of proving that they had changed their citizenship between July 12 and August 23, 1971." This, we submit, was error. It is true that plaintiffs have the burden of proving jurisdiction but this

(cont'd on following page)

See also, Smith v. Sperling, 117 F.Supp.781, 809(S.D.Cal.1953), affd. in part, 237 F.2d 317(9-Cal.1956), rvsd.oth.gnds., 354 U.S.91(1957), where the Court held that its ruling upon diversity would be inapplicable to a trial on the merits:

> "So also the findings of this court which serve as predicate for the conclusion that the plaintiff-stockholder's corporation is not in 'antagonistic hands' cannot operate to bar contrary findings by a court having plenary jurisdiction of the case, since the collateral estoppel doctrine is not applicable to such interlocutory or 'incidental' determinations of fact * * *."

Similarly, Parsons v. C.&O. Ry.Co., 375 U.S.71 (1963), held that state court rulings regarding forum non conveniens do not preclude the federal court from passing upon the claim.

In C.A.B. v. Delta Airlines, 367 U.S.316, it was stated that whenever questions concerning finality of decisions, either administrative or judicial, arise, that there are two opposing policies which both must be recognized:

> "* * * The desirability of finality on the one hand and the public interest in reaching what, ultimately, appears to be the right result on the other. Since these policies are in tension, it is necessary to reach a compromise in each case," Id.321-322.

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7. (cont'd from preceding page)

proposition goes no further than the proposition that plaintiffs have the burden of proof in every case. Plaintiffs never have the burden of disproving defensive issues. Both "res judicata" and "estoppel" are expressly declared by Rule 8(c),F.R.Civ. P. to be defensive issues upon which respondents have the burden. Petitioners met their burden with factual affidavits establishing prima facie that on August 23, 1971 when this suit was filed, they were citizens of Arkansas. If respondents wished to defeat these affidavits through a claim of preclusion, the burden of doing so was upon them. Rule 8(c) so provides.

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Why, we ask, can the competing policies not be better adjusted by treating the former decision on the diversity question, which necessarily was aimed at a different date, as persuasive only, leaving the second court free to examine the facts as it finds them? Would such a competing policy not better serve the interest of the law and the litigants?

PROFESSOR MOORE HAS BEEN MISCONSTRUED

The Fifth Circuit apparently cites 1-B Moore, Fed.Prac.,¶0.416[5], in support of its ruling, but we do not read it so. We believe that Moore has read Johnson as a case of claim preclusion only. Citing Johnson, he states that "a final judgment is res judicata," id.2301,(emphasis supplied), even where no appeal is allowed. If "res judicata" is taken to mean "claim preclusion," the statement is eminently correct, but not presently applicable. He continues:

> "When the inability to appeal is made to depend upon the absence of a jurisdictional minimum, the effect of the lower court's judgment as collateral estoppel presents a more clouded question. * * * But if such a lower court judgment is urged as collaterally conclusive [an issue preclusion] of a dispositive issue in a later action on a cause of action involving an amount sufficient to meet the jurisdictional standard for appeal, legislative intent would be frustrated should the judgment be given collateral estoppel effect." id.2301.

In support of his proposition, he cites Fireman's Fund Ins.Co. v. Bybee, 322 S.W.2d657(Tex.Civ.App. 1959), (Appellate court overturned $600 judgment for claimant because insurer had previously obtained $19.90 judgment against claimant; Texas law forbids appeals under $20.) as a horrible example of the overextension of the law of former adjudication.

Taking a hypothetical non-appealable judgment for less than $100, Moore argues that the legislature did not intend to allow to the court "power to adjudicate claims in excess of $100 except

subject to review *** [on appeal]" and concludes:

> "On analogy to the principle that a court should not be permitted to exercise jurisdiction indirectly through the collateral estoppel effects of its judgments, over cases that are beyond its jurisdiction to adjudicate directly, the judgment of the court of small claims should be denied collateral estoppel effect in this situation," id.2301-02.

Petitioners' argument is the same. A federal district court does not have jurisdiction to order that there shall be no right of appeal when a case is dismissed, and that which it does not have power to do directly may not be accomplished indirectly.

Professor Moore also interprets the Munsingwear case favorably to petitioners.

Unless the right of appeal is a valuable right, why does the appellate court have a "duty" to vacate the opinion below? Says Moore, 1-B Moore, Fed.Prac., ¶0.416[6],p.2326:

> "***Unless the appellant was in some way responsible for losing *** [the right of appeal], giving collateral estoppel effect to the lower court judgment unnecessarily frustrates legislative intent ***. While the litigant may have had his day in court ***, he has not had as much of a day in court as Congress or the State Legislature intended to give him.
>
> "[Author's footnote] *** Justice Douglas, in Munsingwear *** assumed the proposition stated [above] ***."

In Mechling Barge Lines v. U.S., 368 U.S.324 (1961), this Court interpreted Munsingwear to the same effect:

> "*** This Court [there] expressed the view that a party should not be concluded in subsequent litigation by a District Court's resolution of issues, when appellate review of the judgment

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> incorporating that resolution, otherwise available as of right, fails because of intervening mootness. * * * We think the principal enunciated in Munsingwear at least equally applicable to unreviewed administrative orders * * *."

The denial of the right of appeal is the denial of the right of appeal. It is of little consequence to the victim of a murder whether he was shot with a gun or stabbed with a knife; he is still dead. Likewise, it matters not whether appeal of a case is denied for mootness or because of express non-appeallability; the result is the same. The right is valuable and important and may not be deprived unless a competing policy demands it. As we have shown, there is no such competing policy and no such demand.

MANY AUTHORITIES HOLD AGAINST PRECLUSION WHERE THERE WAS NO RIGHT OF APPEAL

In varying contexts, the courts have emphasized the right of appeal and have refused to apply issue preclusion when the party could not appeal.

In Bakula v. Schwab, 168 N.W.378(Wisc.1918) the Court stated:

> "An element essential to constitute res adjudicata is a right of appeal from the judgment."

In Hickman v. Hickman, 121 A.2d 689(Dela.Sup. 1956), the Court refused to allow preclusive effect to a justice of the peace finding that a Nevada divorce was valid "from which determination in this State there lies no appeal." In New Milford Block Co. v. Ericson, 206 A.2d 487 (Conn.Cir.App.Div.1964) the Court refused to apply issue preclusion to a small claims judgment which the statute declared to be "final, conclusive and non-appealable."

While the Texas Court expressly refused to follow Res. Jmts., §69(2) in Fireman's Fund Ins. Co. v. Bybee, supra, a subsequent Texas case did follow

the Restatement and held that inasmuch as "no effective appellate review was available in the prior suit," issue preclusion was inapplicable. Employers Mutual Cas. Co. v. Lee, 352 S.W.2d 155(Tex.Civ.App. 1961). Petitioners submit the later Texas case as the better authority. For a case in accord, with Employers, see Horowitz v. Horowitz 199 At1.816(Md. 1938).

Res. Jmts,§69(2) was also followed in Minor v. Lapp, 33 Cal.Reptr.864(Cal.App.1963) a moot appeal case, the Court stating that "to preclude any possible claim of application of res judicata, we dismiss without prejudice."

> "Although a substantial portion of this opinion relates to the issue of whether the claimed loss is deductible under the tax laws, we stress that this is dicta only and will have no collateral estoppel effect in any other forum. Thus, defendant's inability to appeal his judgment will not preclude its reasserting the deductibility defense in a refund suit for a later year." Parmelee Trans. Co. v. U.S. 351 F.2d 619, 621 (Ct.Cl.1965).

In U.S. v. 111.2 Acres, 293 F.Supp.1042,1049 (E.D.Wash.1968)aff'd 435 F.2d 561(9-Wash.1970), the State of Washington had appeared as amicus curiae in previous litigation and judgment had gone against it. Relying on §69(2), it was held that the ruling had no preclusive effect because an amicus has no right of appeal.

In Geracy Inc. v. Hoover, 133 F.2d 25(C.A.D.C. 1942) a tenant's action for damages to his goods caused by the landlord's negligent repair to the roof, the tenant was held precluded by the prior judgment for possession obtained in an inferior court. Justice Rutledge (later of the Supreme Court) vehemently dissented:

> "I do not think Congress intended these consequences or that the Municipal Court should adjudicate a claim in excess of its jurisdictional limit * * *.

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"Congress intended the Municipal Court to keep within the bounds of power prescribed.
* * *

"Congress intended none of these results.

* * * * * * * * *

"If res judicata could be thought rightly to require such results, this judge-made rule should give way before being allowed to dictate consequences so unjust and so contrary to the intent and explicit prohibition of Congress.

* * * * * * * * *

"In my opinion therefore, the bar of res judicata should not be applied further than to prevent relitigation of the right to possession and the claim for rent [being all that the inferior court had been authorized by Congress to decide]."

The parallel to the present case is obvious. Congress did not empower the U.S. District Court sitting in the Eastern District of Arkansas to expressly provide that a dismissal of order cannot be appealled. Particularly, the Arkansas court could not have ordered dismissal of a Texas case and prohibit the right of appeal. Congress did not intend that which cannot be done by direction should be accomplished by indirection.

It appears that the dissent in Geracy has now become the law in the District of Columbia. See Tutt v. Doby, 459 F.2d 1195(C.A.D.C.1972) where the Court held "no preclusion" expressly relying on Res. Jmts., §69 (2).

Professor Scott, one of the principal reporters for the original Restatement declared as follows back in 1942:

"A judgment rendered by the trial court may not be conclusive by way of collateral

estoppel because the unsuccessful party cannot obtain the decision of the appellate court upon the matter decided adversely to him. The fact that a party who might have appealed fails to do so is immaterial; but the fact that he is unable to appeal is of importance." Scott, Collateral Estoppel, 56 Harv.L.Rev. 1,15(1942).

It is now 1975 and the law of former adjudication as expressed in the new Res.Jmts.,§68.1 is the only rule that comports with the modern view. The law of prior adjudication is not a mechanical monolith. "It is not meant to create vested rights." Issue preclusion must be applied "with its limitations carefully in mind so as to avoid injustice."

In Collateral Estoppel:It's Application and Misapplication, 29 Wash.&L.L.Rev.110(1972) it is stated that the doctrine of prior adjudication is subject to many ambiguities, that no hard and fast rules can be drawn, that there are conflicting policies and standards, that the theories are complex, and that the law is fraught with danger if mechanically applied. These are the considerations which the Supreme Court failed to recognize in 1894 and the Fifth Circuit failed to recognized in 1974.

Even the first Mr. Justice Harlan who wrote that decision conceded that the result was harsh. However, the Court declared that it had no power to alter this mechanical rule described as "res judicata" and declared that relief must come through legislative action. It is now 81 years later and no legislative action is in sight; the reason being that the law of prior adjudication is almost entirely a creature of the courts,"judicial in origin, "Commissioner v. Sunnen, Supra at 597. If it is harsh, if it is difficult to understand, if it is inflexible, it is because the courts have made it so.

This case presents an opportunity for the Supreme Court to assist the ALI in its work toward a modern, realistic, flexible, common-sense view

of the law of prior adjudication. To this end petitioners ask that certiorari be granted.

.....

SECOND QUESTION: PETITIONERS HAVE PRESENTED A CLEAR CASE OF PENDENT JURISDICTION

.....

Within the last few terms, the Supreme Court has decided several knotty cases on the subject of pendent jurisdiction. To our way of thinking, the present case is entirely different. There is open and shut error on the face of the opinion below. The Court's statement that "there was never any basis of federal jurisdiction [stated in the complaint] sufficient to support pendent jurisdiction ***," applies the wrong test. Unless the federal claim is completely insubstantial, it invokes federal jurisdiction.

The error shown is of the type for which this court can and should issue a per curiam order, grant the writ, vacate and remand without briefing and formal argument as the court did in Dallas County v. Reese, 43 U.S.L.W. 3611 (May 19, 1975). The error is of the type that such action would be appropriate.

In Bell vs. Hood, 327 U.S.678(1946), the lower courts dismissed for want of jurisdiction but the Supreme Court reversed:

> "Before deciding that there is no jurisdiction, the District Court must look to the way the complaint is drawn to see if it is drawn so as to claim a right to recover under the Constitution and laws of the United States. For to that extent 'the party who brings a suit is master to decide what law he will rely upon. * * * 'Where the complaint as here, is so drawn as to seek recovery directly under the Constitution or laws of the United States, the federal court, but for two possible exceptions later noted, must entertain the suit.
>
> * * * Whether the complaint states a cause of action on which relief could be granted is a

> question of law and, just as issue of fact, it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state any grounds for relief, then dismissal of the case would be on the merits, not for want of jurisdiction. * * * The previously carved out exceptions are that a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such claim is wholly insubstantial and frivolous (emphasis supplied)."

In their newest volume received from the printer on April 3, 1975, Wright and Miller discuss many decisions of this Court and conclude:

> "Thus a federal court must dismiss for want of jurisdiction if the federal claim that is the basis for jurisdiction is obviously without merit or is wholly frivolous. It similarly must dismiss for want of jurisdiction if the claim is clearly foreclosed by prior decisions of the Supreme Court. The test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim federal jurisdiction exists." 13 Wright & M. Fed.Prac. §3564, pp. 429-430.

In Hagans v. Lavine, 415 U.S.528(1974), it was held that a challenge to a Welfare regulation could not be regarded as insubstantial when the Supreme Court had never passed on a similar regulation and the regulation was not so patently immune from federal claims to require no meaningful consideration.

Nor does it make any difference whether the plaintiff ultimately prevails upon his federal claim as long as he pleads an arguable claim.

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"If the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." The Fair v. Kohler Die Company 228 U.S.22,25(1913).

The merest perusal of the text and authorities cited clearly reflects that the Fifth Circuit has applied the wrong test in the present case.

A SUBSTANTIAL FEDERAL CLAIM WAS PRESENTED.

The District Court's opinion states "Defendants' previous Motion to Dismiss for lack of jurisdiction together with their challenge to plaintiffs' amended complaint are now before the Court under Fed.R.Civ.P. 12(b) (1) [motion to dismiss for want of jurisdiction of the subject matter]. As hereinafter set forth, this cause is dismissed without prejudice for want of jurisdiction" (P.A. 2).

The complaint alleges :

"This is a civil action or proceeding arising under the Communications Act Amendments of 1952, P.L.554, ch.879,§18,66 Stats.711,722, prohibiting the interstate transmission of any communications in furtherance of any scheme to obtain money or property by means of false or fraudulent pretenses, representations or promises, as hereinafter more fully appears. This Court has original jurisdiction of this case under 28 U.S.C.§1337." (J.A.17)

Plaintiffs proceeded to allege specific matters as being represented and held out to them and further specifically alleged that defendants as fiduciaries deliberately omitted certain material facts causing their communications to be deceptive (J.A. 18-22).

"15. Each of the aforesaid communications, representations, statements and omissions was conducted by and between defendants situated at Dallas, Texas and plaintiffs situated

at Cherokee Village, Arkansas and Hardy, Arkansas over the common carrier telephone facilities between the said points.

16. In making the said communications, representations, and omissions, defendants utilized the facilities of interstate commerce.

17. Such communications, representations and omissions were made, conducted and transacted in the course of interstate commerce."(J.A.22)

The complaint further alleges the conduct of defendants as "false, fraudulent, and deliberate * * * done as part of a scheme to deprive plaintiffs of their ownership of said property * * * " (J.A.23). In support of their federal claim, petitioners cited and discussed approximately fifteen authorities holding that a private right of action may be inferred from federal statutes, criminal and regulatory, including Wyandotte Co. v. U.S., 389 U.S.191 (1967) and J.I. Case Co. v. Borak, 377 U.S.426(1964). Petitioners placed primary reliance upon Reitmeister v. Reitmeister, 162 F.2d 691(2-N.Y.1947) where Judge Learned Hand held that the sections of the Communications Act which declared to be criminal, the unauthorized interception and publication of interstate telephone messages, created a federal cause of action for damages.

As a general proposition, it cannot be denied that the federal courts have numerously inferred a federal cause of action from federal criminal statutes. A case of this classification was argued before this Court on March 18, 1975, Cort v. Bethlehem Steel Corp.,U.S. S.Ct.No.73-1908. In Cort as we understand it, the general principal is not in dispute, only the application of that principle. Similarly, the only dispute which could have been open in the Fifth Circuit was the application of the principle, not the existence of the principle: federal criminal statues can create a federal cause of action for damages.

The particular wire fraud statute under which

petitioners were proceeding had never been construed before. Respondents did not contend to the opposite and neither of the courts held to the contrary. The fact that the Fifth Circuit rejected Reitmeister and held the case to be controlled by a decision concerning mail fraud without discussing the various other cases urged by petitioners did not control the question as to whether a federal question had been pleaded. The Fair v. Kohler Die Company, supra. It has never been suggested that petitioners' federal claim was "so attenuated and unsubstantial as to be absolutely devoid of merit", Hagans v. Lavine, supra. Whether or not the federal claim could have been dismissed under Rule 12(b) (6), F.R.Civ.P., "Failure to State a Claim Upon Which Relief Can Be Granted," is immaterial. Beyond doubt, the claim was of sufficient substance to invoke the jurisdiction of the federal court.

INASMUCH AS THE FEDERAL CLAIM WAS ARGUABLE, PENDENT JURISDICTION OF THE STATE CLAIM ATTACHED.

> "If the plaintiff raises a substantial federal question, the * * * decision must go on the merits * * *. Jurisdiction is not lost because the court ultimately concludes that the claim is without merit. * * * The only practical importance of the distinction between the two kinds of dismissals is that if the federal claim is substantial enough to invoke federal jurisdiction, the court has power to exercise pendent jurisdiction over other claims that also may be asserted in the complaint, for which there is no independent jurisdictional basis." 13 Wright & M., Fed. Prac., §3564, pp. 429-430.

Pendent jurisdiction is almost as old as the federal union. The doctrine was revisited, broadened, and re-affirmed in United Mine Workers v. Gibbs, 383 U.S. 715 (1966). If there is jurisdiction because of a federal question of substance, there is power to hear pendent claims that "derive from a common nucleus of operative fact." The federal court has pendent jurisdiction of any state law

claims that a plaintiff "would ordinarily be expected to try all in one judicial proceeding." In Hagans v. Lavine, supra., a marginal federal constitutional claim was held sufficient to confer pendent jurisdiction over a federal statuatory claim, for which the amount in controversy requirement was not satisfied. Pendent jurisdiction was also upheld in Rosado v. Wyman, 397 U.S. 397 (1970).

Many cases are cited and discussed in 13 Wright & M., Fed. Prac., §3567.

It follows as the night the day that the district court erred in holding that it had no jurisdiction, pendent or otherwise over the petitioners' claims to recover for defendants' false representations made over the common carrier telephone system. It had pendent jurisdiction vesting it with the power to proceed to trial.

PETITIONERS HAVE BEEN DENIED THE OPPORTUNITY TO INVOKE THE DISTRICT JUDGES' DISCRETIONARY JURISDICTION OVER PENDENT CLAIMS

Of course, pendent jurisdiction is discretionary jurisdiction. Gibbs declared that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right," and that trial courts should look to "considerations of judicial economy, convenience and fairness to litigants," Id. 726. We present that petitioners were entitled to urge the District Judge to invoke her discretionary jurisdiction and that her erroneous ruling of "no jurisdiction" deprived them of this right. We concede that the usual rule is to dismiss pendent claims when the federal claim is dismissed, but dismissal is not automatic. Under the particular facts of this case, the court should not have dismissed:

(1) Respondents swore that diversity existed and removed this cause of action (a different case, same cause of action) out of the Arkansas State Court, kept it there almost two years with one

dilatory motion after the other and then impeached their own affidavits so as to cause the case to be sent back to the state court where it was dismissed for lack of long-arm jurisdiction.

(2) Their motives are plain. The Arkansas Federal Court had indicated it was going to sustain long-arm jurisdiction and defendants were attempting to engage in forum shopping.

(3) By impeaching their own affidavit, respondents managed to manuever a ruling of "no diversity" in a non-appealable proceedings thus depriving these petitioners of the right to contend on appeal of error in that finding of "no diversity."

(4) Respondents have made only a token effort to establish the correctness of the Arkansas ruling of "no diversity." They are satisfied to claim that petitioners have been manuevered out of the right to contest it. We urge that, at most, the soundness of the Arkansas Court's ruling is questionable. Respondents contend that even though the order was non-appealable, the finding of "no-diversity" is conclusive. We submit the obvious proposition that the ultimate function of the courts is to dispense justice. If the District Court below finds the non-appealable Arkansas remand order to be unsound, or even questionable, should the Court not weight this factor heavily in favor of retaining its discretionary pendent jurisdiction?

(5) Respondents' manuevering is not over by any means. They unabashedly advised both of the Courts below that they will urge the two year statute of limitations against Petitioners if the case is dismissed and refiled in the Texas state court. Should the District Court decline pendent jurisdiction when to do so will expose petitioners to a claim of limitations?

(6) And the delay--petitioners were bilked out of their property way back in 1969. Almost six years have passed. They have been through

court after court. Each agrees that they have a "very serious lawsuit" (J.A.11) and then concludes they should go elsewhere for relief. How long, Oh Lord, how long? Certainly, the Court should consider both the time that the case has been pending and the prospects that the case might be further delayed in deciding whether to exercise its pendent jurisdiction.

(7) Please do not lose sight of the peculiar nature of this case, a claim of malpractice and fraud against a firm of lawyers (and their insurance carrier, Continental Casualty Co.). What about the political ententes and intrigues that exist in most every courthouse. Can the petitioners obtain a really fair trial in the Dallas County Courthouse where the Court has refused to hear motions to disquality, has set aside a plaintiffs' verdict and has ordered a fourth trial (P.A.20-21). This Court is too far removed to know the precise situation, but not so far away and not so ignorant of human nature or to be unaware of the existence of an area of possible concern. The District Judge is close enough to evaluate the situation and petitioners are entitled to have the Court exercise its discretion upon the matter.

(8) At a minimum, we have a situation where the petitioners are locked in combat with parties who go to the courthouse daily and are personally acquainted with the judges--judges who incidentally come up for re-election every four years and look to the lawyers to assist their campaigns. Without pointing accusing fingers at anyone, we suggest that, with respect to a case such as this, the Dallas County Courthouse does not exhibit those characteristics of even-handed justice and judicial impartiality that are at the core of Due Process of Law. In re Murchison, 349 U.S.133(1955).

(9) Cases such as Commonwealth Coatings Corp. v. Continental Cas.Co., 393 U.S.145(1968) and Rapp v. Van Dusen, 350 F.2d 806(3-Pa.1965), held that courts must not only be impartial in fact, but impartial in appearance and emphasize that circumstances which contain even the temptation to par-

tiality must be avoided. Thrust anyone whom you desire into the shoes of these petitioners, he will approach the Dallas County Courthouse with misgivings as to whether he can obtain a fair trial. And, if the case goes against him, he is certain to go away convinced that he is the victim of bias and prejudice. Speaking from the standpoint of essential justice, this is a type of case that deserves to be heard in a federal forum.

(10) Weighing the circumstances together, it is presented that this case favors, if it does not command, the exercise of pendent jurisdiction.

A RULING OF "NO POWER TO DECIDE" DOES NOT CONSTITUTE AN EXERCISE OF THE DISCRETION TO DECIDE.

The proposition is simple, as long as the District Judge was under the impression that she had no power to consider the case, she could not weigh the pros and cons for and against the exercise of discretion. In Parsons v. C&O Ry.Co., supra, it was held that the federal court's ruling of no jurisdiction to consider the forum non conveniens issue upon its merits, was not equal to an exercise of discretion upon the question.

In Knuth v. Erie-Crawford Dairy Coop., 395 F.2d 420,426(3-Pa.1968), the discretionary dismissal of pendent claims was reversed because "the court lacked an acceptable basis for exercising its discretion."

On remand, the District Court ruled in favor of pendent jurisdiction:

"After a case has been waiting for years to reach the courtroom and then testimony had been taken for several weeks, sound judicial administration dictates that the trial continue to a conclusion. Furthermore, it would not simply be a matter of remanding to the state * * * because in those forums the statue of limitations could be raised as an almost insurmountable defense to the plaintiffs' cause. Indeed, it would probably have

been an abuse of discretion not to conclude the case." Knuth v. Erie-Crawford Dairy Coop.,326 F. Supp. 48,57(W.D.Pa.1971).

"A failure to recognize the existance of authority to exercise discretion does not amount to its exercise. We therefore conclude that in order to afford the District Court the opportunity to exercise its discretion in the first instance, we must vacate the dismissal * * * and remand for proceedings consistent with this opinion." Webb v. Bladen, 480 F.2d 306(4-Va.1973).

We do not contend that every case containing pendent claims must be remanded when the trial court mistakenly dismisses for want of jurisdiction when it properly should have dismissed for failure to state a federal cause of action. Pendent jurisdiction is concerned with "judicial economy, convenience and fairness to litigants," United Mine Workers v. Gibbs, supra. If the Court of Appeals examines the record and finds no substantial basis upon which the District Court might reasonably exercise its discretion in favor of pendent jurisdiction, the Court of Appeals can declare the error harmless and affirm. But, certainly, the present case is not one of harmless error. Petitioners have a sound basis for their claim of pendent jurisdiction.

It is also possible that the Court of Appeals might properly decline to remand if the plaintiff had failed to point out the existence of pendent jurisdiction to the district court. However, your petitioners did point out the existence of pendent jurisdiction to the District Court (Brief Supporting Jurisdiction, filed September 4, 1973, J.A.2) and respondents filed their opposition thereto (Supplemental Motion to Dismiss, filed September 25, 1973)(J.A.2R34-35). Thereafter, the District Court dismissed the entire action "for want of jurisdiction." (J.A.27) impliedly ruling that pendent jurisdiction was not present. Petitioners are entitled to have the matter returned to the Dis-

trict Court where the District Court after being apprised that it indeed does have jurisdiction, may exercise her sound judicial discretion upon the matter.

THE "DISMISS BEFORE TRIAL" RULE IS NOT A MANDATE

The real question upon the claim of pendent jurisdiction, if there be one, asks not whether pendent jurisdiction exists but whether this be a case in which the power might rightfully be exercised. We refer to the declaration in Gibbs that "if the federal claims are dismissed before trial even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well," Id.726. Petitioners suggest that this statement should be interpreted as a guideline, rather than a mandate. According to Rosado v. Wyman, 397 U.S.397,402,404,405(1970), there is no absolute rule requiring a district court to dismiss every case where the federal issue fails before trial upon the merits:

> "In the case before us the constitutional claim was declared moot prior to decision by the three-judge court and the question arises whether that circumstance removed not only the obligation but destroyed the power of a federal court to adjudicate the pendent claim. We think not.
>
> * * * * * * * * *
>
> "Respondents analogize dismissal for mootness to dismissal for want of a substantial claim and rely on language in United Mine Workers v. Gibbs, to the effect that a federal court should not pass on a state claim when the federal claim falters at the threshold and is 'dismissed before trial.' 383 U.S., at 726. The argument would appear to be that once a federal court loses power over the jurisdiction-conferring claim, it may not consider a pendent claim. They contend that

mootness, like insubstantiality, is a threshold jurisdictional defect.

* * * * * * * * *

"We are not willing to defeat the commonsense policy of pendent jurisdiction--the conservation of judicial energy and the avoidance of multiplicity of litigation--by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim. * * *."

Various federal courts have held that they can and should retain pendent jurisdiction even though the federal claim was dismissed before trial. Scoville v. Bd.Educ., 286 F.Supp.988(N.D.Ill. 1968), rvsd.oth.gnds.425 F.2d 10(7-Ill.1969); McCurnin v. Kohlmeyer,477 F.2d 113(5-La.1973); A. H. Emery Co. v. Marcan Corp., 268 F.Supp.289(S.D. N.Y.1967) affd.389 F.2d 11(2-N.Y.1968); Rogers v. Valentine, 37 F.R.D.231(S.D.N.Y.1964), Brunswick v. Regent,463 F.2d 1205(5-Fla.1972).

"Should the pendent claim always be dismissed if the federal claim fails before trial?" asks Hart & W., Federal Courts, 2d Ed.(1973),p.925. If "limitations has run * * * in the interim," it is suggested that essential fairness requires the federal court to retain jurisdiction. A study by the ALI is cited to the effect that discretionary dismissal be conditioned on a specific finding that" 'determination * * * in a State court is in the interest of justice and not prejudicial to the parties.'" Petitioners ask nothing further under their claim to pendent juris.

See also, Baker, Toward a Relaxed View of Pendent Jurisdiction, 33 U.Pitt.L.Rev.,759(1972), arguing that Gibbs does not lay down any strict limitations on the handling of pendent issues and that the federal courts should not fence themselves in with arbitrary rules. By retaining a pendent issue for trial, urges the author, the federal court is doing no more than it does in

any garden variety diversity case. Intrusion on the state courts' jurisdiction, says the author, is a false issue. Wherever the state forum is more appropriate, jurisdiction maybe declined. The only guideline required or necessary, it is concluded, is the guideline in Gibbs of "judicial economy, convenience and fairness."

We have already stated why under the particular facts of this case, the District Court should not have dismissed. We would point out that respondents originally brought this litigation into the federal enclave by swearing that petitioners are citizens of Arkansas. Only when it suited their own objectives did they impeach their affidavit. The respondents conceded to both of the courts below that they will resist a refiling of this litigation in state court upon grounds of limitations. Is this alone not a sufficient basis for the exercise of pendent jurisdiction?

CONCLUSION

The errors presented by this petition are a bit unusual. Under the first question, petitioners urge that the Court of Appeals has erred by blindly following a decision of this Court which might have been controlling except that it has long since been outmoded. Under the second question, petitioners urge the converse. The Court of Appeals has wholly failed to follow the controlling decisions of this Court, all of them of recent vintage, regarding pendent jurisdiction.

Either of the questions presents an ample basis for this petition. Your petitioners ask that a Writ of Certiorari be granted.

Respectfully submitted,

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Of counsel:

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June 11 , 1975

APPENDIX

FEDERAL COURT PROCEEDINGS--ARKANSAS

NO. LR--71-C-124 JIM L. NAPPER & WIFE, PLAINTIFFS V. ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC., DEFENDANTS, U.S. DISTRICT COURT, E.D.ARK.W.D.

[DEFENDANTS] PETITION FOR REMOVAL
[Filed E.D.Ark.,July 13, 1971; R.28-29]

1. This is a civil action between citizens of different states, the amount in controversy exceeds the sum of $10,000.00, exclusive of interest and costs, and this is a matter of which this court has jurisdiction.

2. At the time of the commencement of this suit and at the present time Jim L. Napper and Jo Ann Napper were and are citizens of the State of Arkansas.

* * * * * * * * *

4. This action was filed in the Circuit Court of Pulaski County, Arkansas, on June 9, 1971.

* * * * * * * * *

WHEREFORE, defendants petition for removal of this cause to this court from the Circuit Court of Pulaski County, Arkansas.

* * * * * * * * *

Winslow Drummond, being duly sworn, states that he is one of the attorneys for the defendants and that the facts alleged in the foregoing petition for removal are true to the best of his information, knowledge and belief.
[Here omitting jurat dated July 12, 1971]

. . . . . .

[DEFENDANTS'] MOTION
[Caption as immediately foregoing; filed E.D.Ark. Nov.21,1972;R.65-66]

* * * * * * * * *

3. Paragraph 3 of the amended complaint states: "Notwithstanding the fact that plaintiffs, Jim L. Napper and wife, Jo Ann Napper, own homestead property in Texas, they have established and maintain sufficient residence in the State of Arkansas to

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entitle them to invoke the diversity jurisdiction of the United States District Court for the Eastern District of Arkansas." It would appear, therefore, that the plaintiffs are citizens of the State of Texas and that there is, therefore, no diversity of citizenship between the plaintiffs and the defendants and that this action ought to be dismissed for want of jurisdiction.

. . . . . .

ORDER [REMANDING CASE]
[Caption as immediately foregoing; filed E.D.Ark.,May 10,1973;R.64]

Presently pending in this case is a motion to remand filed by defendants for failure of diversity jurisdiction. On this day an evidentiary hearing was held and in conformity with the findings of fact and conclusions of law as stated by the Court from the bench at the conclusion of the presentation of evidence and argument, it is ordered that this case be, and it is hereby, remanded to the Circuit Court of Pulaski County, Arkansas.

Dated this 9th day of May, 1973.

. . . . . .

FEDERAL COURT PROCEEDINGS--TEXAS

NO. CA 3-5046-B JIM L. NAPPER et ux v. ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, et al, U.S. DISTRICT COURT, N.D.TEXAS,DALLAS DIVISION

MEMORANDUM OPINION AND ORDER
[Filed Oct.3,1973;R.49-54]

Defendants' previous Motion to Dismiss for lack of jurisdiction together with their challenge to plaintiffs' Amended Complaint are now before the court under Fed. R. Civ. P 12(b)(1). As hereinafter set forth, this cause is dismissed without prejudice for want of jurisdiction.

Following litigation in the Texas state courts respecting the validity of a certain real estate instrument, Naper v. Johnson, 464 S.W.2d 496 (Tex. Civ. App. 1971), writ ref. n.r.e., plaintiffs filed a complaint on June 9, 1971, in the Circuit Court, Pulaski County, Arkansas, against the law firm and its members that represented plaintiffs in the real estate transaction at issue.

On July 12, 1971, defendants in the Arkansas state court proceeding filed a Petition for Removal in the United States District Court for the Eastern District of Arkansas asserting diversity jurisdiction.

Immediately after removal, defendants filed a Motion to Quash Service of Process. While that Motion was pending, on November 21, 1972, defendants filed a Motion to Dismiss for want of diversity jurisdiction asserting plaintiffs to be domiciled in Texas.

While the plaintiffs' complaint was pending in the federal district court in Arkansas after removal from the state court, plaintiffs filed on August 23, 1971, in this court another complaint against the same defendants as were named in the Arkansas proceeding. This second complaint was identical, except for minor grammatical changes, to the complaint pending in the federal district court in Arkansas. Paragraph four (4) of the complaint filed in this cause alleges in pertinent part:

> Plaintiffs are filing this suit as a precaution against having their cause dismissed after the tunning of the applicable limitation period. Plaintiffs request that the Court withhold proceedings hereon pending a ruling by the federal courts of Arkansas upon the jurisdictional question.

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On September 25, 1973, plaintiffs filed their Amended Complaint in this cause. This Amended Complaint re-stated the same cause of action and same jurisdictional allegations that were presented in the Arkansas litigation; however, as an alternative cause of action, plaintiffs alleged "federal question" jurisdiction under 28 U.S.C. 1337 by virtue of defendants' violation of the penal standards of the Wire Fraud Act, 18 U.S.C. 1343 (1970).

Faced with a challenge to their allegation of diversity jurisdiction grounded in the remand order by the federal district court in Arkansas, plaintiffs' amendment to their Complaint is an attempt to establish "federal question" jurisdiction so as to create pendent jurisdiction over what is otherwise a state law cause of action contingent upon diversity jurisdiction.

Under the authority of Oppendeim v. Sterling, 368 F.2d 516, 518-19 (10th Cir. 1966), cert. den. 386 U.S. 1011 (1967), reh. den. 388 U.S. 925 (1967), 389 U.S. 1059 (1968), this court rejects plaintiffs' "federal question" jurisdiction allegations relating to 28 U.S.C. 1337. Accord Van Daele v. Vinci, 294 F. Supp. 71 (N.D. Ill. 1968).

In rejecting this allegation of jurisdiction, this court notes that 28 U.S.C. 1337 applies only to civil action arising from an Act of Congress regulating commerce. The cited statute, 18 U.S.C. 1343 (1970), is penal in nature and does not create any civil action as does, for example, the various securities acts. Moreover, a careful reading of 18 U.S.C. 1343 (1970) shows it not to regulate commerce, but rather to regulate personal behavior arising out of commerce. Finally, as a matter of judicial philosophy, were 28 U.S.C. 1337 to apply

in this situation, then jurisdiction could be created in any cause by merely alleging a violation of a federal penal statute, an argument rejected in Van Daele, supra.

As to the remand order entered by the federal district court in Arkansas, this court has examined the briefs submitted by counsel in this cause and reviewed the exhibits attached thereto. It is clear that the federal district court in Arkansas conducted a full evidentiary hearing into the issue of diversity and applied the facts presented at that hearing in ruling that plaintiffs were domiciled in Texas although residents of Arkansas.

It is well established that in an in personam action pending in two courts between the same parties on the same cause of action, both courts may proceed with the litigation until a judgment is obtained in one that is res judicata in the other. Princess Lida of Thurn and Taxis v. Thompson, 305 U.S. 456, 466 (1938). However, plaintiffs in this cause sought, and received, a stay in the proceedings in this court pending a decision on the issue of diversity jurisdiction in the Arkansas litigation. There can be no challenge to the fact that the Arkansas federal court had jurisdiction to determine the issue of diversity jurisdiction. See Ripperger v. A. C. Allyn & Co., 113 F.2d 332 (2nd Cir.), cert. den. 311 U.S. 695 (1940). In that context, the remand order for lack of diversity jurisdiction is a final judgment that cannot be questioned despite the lack of an appeal from that order.

This bar is equally applicable to remand orders and to judgments on the issue of diversity jurisdiction. With respect to

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remand orders, see Metropolitian Cas. Ins. Co. v. Stevens, 312 U.S. 563 (1940); Missouri Pacific Ry. v. Fitzgerald, 160 U.S. 556 (1895); Yankaus v. Feltstein, 244 U.S. 127 (1917). With respect to judgments on diversity, see McCormick v. Sullivant, 10 Wheat. (23 U.S.) 192, 199 (1825); Evers v. Watson, 156 U.S. 527 (1895).

In this cause, which is between the same parties and on the same cause of action as before the federal district court in Arkansas, the Arkansas judgment on the domicile of plaintiffs is res judicata on that issue. As such, this court cannot make any inquiry into the standard of law applied or the findings of fact made by that court. See Burgess v. Nail, 103 F.2d 37, 43-44 (10th Cir. 1936); In re Constructors of Fla., Inc., 349 F.2d 595 (5th Cir.), cert. den. 383 U.S. 912 (1965). This is true even if the legal standard has changed, see Barzin v. Selective Service Local Board No. 14, 446 F.2d 1382 (3rd Cir. 1971).

To maintain a diversity action in federal court in a removal action, diversity must exist at both the time of the filing and at the date of removal. 1A J. MOORE, FEDERAL PRACTICE Para. 0.161(1) at page 528 with supporting cases cited in note 34. Thus, the Arkansas judgment that plaintiffs are residents of Texas is res judicata as to the date of filing of that complaint (June 9, 1971) and the date of removal (July 12, 1971).

The issue is joined, therefore, whether plaintiffs changed domicile between July 12, 1971, and the date this cause was filed, August 23, 1971.

When a party attempts to assert the doctrine of changed circumstances with respect to an issue relating to jurisdiction, the standard is very strict. For example, having once been dismissed for lack of a justiciable controversy, an alien's suit to bar deportation after a final deportation order was issued is still barred by the doctrine of res judicata. Estevez v. Nabers, 218 F.2d 321 (5th Cir. 1955). Accord, Ripperger v. A.C. Allyn & Co., 113 F 2d 332 (2nd Cir.), cert. den. 311 U.S. 695 (1940); Hellebrand v. Hoctor, 222 F. Supp. 81 (E.D. Mo. 1963), affirmed 331 F.2d 453 (8th Cir. 1964).

Despite being permitted by this court to amend their Complaint, plaintiffs in this cause do not allege any change in circumstances that assert any change in domicile since July 12, 1971. The Supplemental Affidavit executed by plaintiffs on August 23, 1973, purporting to state their subjective intentions in July, 1971, is substantially identical to the previous Affidavit filed in this cause and does not allege and factual changes subsequent to July 12, 1971, that suggest a change in domicile from Texas to Arkansas. Indeed, plaintiffs' counsel argues ". . . the Arkansas Federal Court erred by holding that people who have admittedly resided in Arkansas. . . are mere sojourners in a strange land." Plaintiffs' September 6, 1973, Brief at Page 7. But as noted, this court cannot initiate inquiries into the legal or factual standard applied in Arkansas.

The burden is solely upon plaintiffs to plead sufficient facts to vest this court with jurisdiction and they have failed to do so.

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IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the above styled and numbered cause be and the same hereby is DISMISSED FOR WANT OF JURISDICTION without prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that each party shall bear their own costs in this cause.,

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FIFTH CIRCUIT PROCEEDINGS

NO. 73-3746 JIM L. NAPPER AND WIFE JO ANN NAPPER PLAINTIFFS-APPELLANTS v. ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, ETC., DEFENDANTS-APPELLEES U.S. COURT OF APPEALS, FIFTH CIRCUIT

OPINION
Sept. 16, 1974
[500 F.2d 634]

Plaintiffs brought diversity action against Texas law partnership and individual partners for alleged malpractice and alternatively sought to recover for alleged violation of Wire Fraud Act. The United States District Court for the Northern District of Texas, Sarah Tilghman Hughes, J., dismissed for want of jurisdiction and the plaintiffs appealed. The Court of Appeals, Rives, Circuit Judge, held that Wire Fraud Act did not operate to create federal cause of action for damages, and that estoppel by judgment precluded plaintiffs from successfully asserting diversity jurisdiction where prior action filed against defendants by plaintiffs in another district court had been dismissed based upon determination that, as of date of removal of the prior action to federal district court, both plaintiffs and defendants were citizens of Texas and change of plaintiffs' citizenship between date of removal of the prior action and filing of complaint in present case had not been pleaded or proved.

Affirmed.

1. Telecommunications ⇐498

Wire Fraud Act did not operate to create federal cause of action for damages against defendants who were alleged to have violated the Act. 18 U.S.C.A. §§ 1341–1343.

NAPPER v. ANDERSON, HENLEY, SHIELDS, ETC.

2. Judgment ⇐649

Estoppel by judgment precluded plaintiffs from successfully asserting diversity jurisdiction in federal district court where another federal district court had dismissed prior action involving same parties based upon determination that, as of date of removal of the prior action to the federal court, both plaintiffs and defendants were citizens of Texas and plaintiffs failed to plead or prove that they had changed their citizenship between date of removal of the prior action and date on which subsequent action was filed, even though plaintiffs were not able to appeal from order remanding the prior action to state court.

3. Judgment ⇐720

Estoppel by judgment will not permit matters actually litigated and determined between same parties in one proceeding to be relitigated.

4. Judgment ⇐634

Estoppel by judgment is accurately termed "direct estoppel" where issue has actually been litigated and determined in an action between same parties based upon same cause of action.

See publication Words and Phrase for other judicial constructions and definitions.

Appeal from the United States District Court for the Northern District of Texas.

Before BROWN, Chief Judge, and RIVES and DYER, Circuit Judges.

RIVES, Circuit Judge:

This appeal is from a judgment of the district court dismissing the case for want of jurisdiction and without prejudice. We affirm.

The complaint seeks the recovery of damages from a Dallas, Texas, law partnership and the individual partners for alleged

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malpractice involving the validity and effect of a conveyance of the Napper's home in Dallas.[1] The first action asserting this claim was filed by plaintiffs on June 9, 1971, in the Circuit Court of Pulaski County, Arkansas. The complaint alleged that the cause of action arose in Arkansas, and sought to have the Arkansas state court acquire "long-arm" jurisdiction over the Texas defendants (See Arkansas Statutes 27–2502).

On July 12, 1971, defendants filed a petition for removal to the Federal District Court for the Eastern District of Arkansas asserting diversity jurisdiction that the plaintiffs were citizens of Arkansas and the defendants were citizens of Texas. Defendants then filed in the federal district court to which the case had been removed a motion to quash the "long-arm" service of process.

The next month, on August 23, 1971, the plaintiffs filed in the United States District Court for the Northern District of Texas a complaint in the present case, identical, except for minor grammatical changes, to the complaint pending in the federal district court in Arkansas. This complaint stated:

> "Plaintiffs are filing this suit as a precaution against having their cause dismissed after the running of the applicable limitations period. Plaintiffs request that the Court withhold proceedings hereon pending a ruling by the federal courts of Arkansas upon the jurisdictional question."

Plaintiffs based federal jurisdiction on diversity of citizenship, asserting that the defendants were all citizens of Texas and going into some detail as to their own citizenship:

> "Notwithstanding the fact that plaintiffs, Jim L. Napper and wife, Jo Ann Napper, own homestead property in Texas, they have established sufficient residence in the State of Arkansas to entitle them to invoke the diversity

1. The conveyance is that described in Napper v. Johnson, Tex.Civ. App.1971, 464 S.W.2d 496.

jurisdiction of the United States District Court for the Northern District of Texas."

The defendants on September 2, 1971, moved to dismiss plaintiffs' complaint for lack of jurisdiction, alleging:

"It affirmatively appears on the face of Plaintiffs' complaint that they are citizens and residents of Texas, as are the Defendants, so that no diversity of citizenship exists. In the alternative, if it does not affirmatively appear on the face of Plaintiffs' complaint that they are citizens of the State of Texas, then Defendants affirmatively assert that they are citizens of such state, so that there is no diversity of citizenship, and the Court has no jurisdiction over the cause of action asserted by Plaintiffs."

More than a year later, on November 21, 1972, the defendants filed in the federal district court in Arkansas a motion to dismiss for want of diversity jurisdiction, asserting plaintiffs to be citizens of the same state as were defendants, that is Texas. On May 9, 1973, a hearing was conducted on that motion to dismiss. The district judge found that the plaintiffs at the time of filing their complaint and since had the intention of going back to Texas. In part, the Judge said:

"The Court believes that his [Mr. Napper's] intention when he came here was not to make Arkansas his home on an indefinite basis, that that is what is absent and, therefore, he remained domiciled in Texas and remained a Texas citizen, although residing in Arkansas."

The case was accordingly remanded to the Circuit Court of Pulaski County, Arkansas. That state court never reached the merits, but ultimately sustained the defendants' motion to quash the "long-arm" service of process.

[1] On September 25, 1973, the plaintiffs filed in the present case an amended complaint reasserting the same claim based on diversity jurisdiction with the same allegations of citizenship. As an alternative claim, the plaintiffs sought to recover damages alleged to have resulted from violation by

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the defendants of the wire fraud act, 18 U.S.C. § 1343.[2] The plaintiffs claim that violation of that criminal statute operates to create a federal cause of action for damages against the defendants, and assert jurisdiction under 28 U.S.C. § 1337.[3]

In Oppenheim v. Sterling, 1966, 368 F.2d 516, 518–519, the Tenth Circuit held that 18 U.S.C. §§ 1341, 1342, relating to mail fraud, are purely penal and rejected "the view that a violation of these penal statutes as such affords the court federal question jurisdiction in a civil case." The wire fraud act, 18 U.S.C. § 1343, is closely analogous to the mail fraud statute, 18 U.S.C. § 1341, and likewise evidences no intent of Congress to grant additional federal question jurisdiction in civil cases. Reitmeister v. Reitmeister, 2 Cir. 1947, 162 F.2d 691, does not persuade us differently.

[2–4] Estoppel by judgment precludes the plaintiffs from successfully asserting diversity jurisdiction. The distinction between res judicata and estoppel by judgment is discussed in Commissioner v. Sunnen, 1948, 333 U.S. 591, 597, 598, 68 S.Ct. 715, 92 L.Ed. 898. Estoppel by judgment will not permit matters actually litigated and determined between the same parties in one proceeding to be relitigated (333 U.S. at 598, 68 S.Ct. 715).[4] We agree with the full and amply supported

2. "§ 1343. *Fraud by wire, radio, or television*
"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

3. "§ 1337. *Commerce and anti-trust regulations*
"The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies."

4. The estoppel by judgment is accurately termed "direct estoppel" where the issue is actually litigated and determined in an action between the same parties based upon the same cause of action. *See*

discussion in 1B Moore's Federal Practice ¶ 0.405[5], that

> "the underlying policy of res judicata is not restricted to a valid judgment that deals solely with the merits; it extends to and includes matters in abatement, such as jurisdiction of the subject matter, federal jurisdiction, jurisdiction over the res, jurisdiction over the defendant, venue, and related matters." (Footnotes omitted.)

As between the two federal district courts, the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action. Johnson Company v. Wharton, 1894, 152 U.S. 252, 14 S.Ct. 608, 38 L.Ed. 429; see also the full discussion of and possible limitations to this rule in 1B Moore's Federal Practice ¶ 0.416[5].

The federal district court in Arkansas held that as of July 12, 1971, the date of removal, it lacked jurisdiction because plaintiffs were on that date citizens of Texas. To sustain federal jurisdiction in the Texas district court, plaintiffs had the burden of proving that they had changed their citizenship between July 12 and August 23, 1971, when their complaint in the present case was filed. Though afforded ample opportunity to do so, the plaintiffs have never pleaded or proved any change of citizenship during that crucial period. The district court properly dismissed the case for want of jurisdiction, and its judgment is

Affirmed.

A.L.I. Restatement, Judgments § 45 comment d; Estevez v. Nabers, 5 Cir. 1955, 219 F.2d 321, 324; Myers v. Ampex, Inc., 5 Cir. 1974, 498 F.2d 1092 [1974]; 46 Am.Jur.2d § 397, p. 566 n. 7. That distinction between "direct estoppel" and "collateral estoppel" helps to make clear our conclusion that neither the standards of law applied by the federal district court in Arkansas nor its findings of fact may be relitigated.

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Jim L. NAPPER and wife, Jo Ann Napper, Plaintiffs-Appellants,

v.

ANDERSON, HENLEY, SHIELDS, BRADFORD & PRITCHARD, etc., Defendants-Appellees.

No. 73-3746.

United States Court of Appeals, Fifth Circuit.

Jan. 31, 1975.
[507 F.2d 723]

Appeal from the United States District Court for the Northern District of Texas; Sarah Tilghman Hughes, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion September 16, 1974, 5 Cir. 1974, 500 F.2d 634).

Before BROWN, Chief Judge, and RIVES and DYER, Circuit Judges.

PER CURIAM:

On consideration of appellants' petition for rehearing, the panel adheres to its decision reported in 500 F.2d 634, that the district court properly dismissed the case for want of jurisdiction. Bell v. Hood, 1946, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, does not require a different result.

Admittedly, the defendants have all along been citizens of Texas. It now appears that on August 23, 1971, the date of filing the complaint in the Texas federal district court, the plaintiffs were also citizens of Texas. The plaintiffs cannot complain that in good faith they considered themselves citizens of Arkansas, and were surprised by the contrary ruling, for on September 2, 1971, ten days after the complaint was

filed, defendants moved to dismiss for lack of diversity. The amended complaint filed two years later, on September 25, 1973, sought recovery also on a claimed federal cause of action which we held to be nonexistent. There was never any basis of federal jurisdiction sufficient to support pendent jurisdiction of the state law claim.[1]

The panel, therefore, declines to grant appellants' petition for rehearing.

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is denied.

1. *See* Hum v. Oursler, 1938, 289 U.S. 238, 53 S.Ct. 586, 77 L.Ed. 1148; Mine Workers v. Gibbs, 1966, 383 U.S. 715, 725, 86 S.Ct. 1130, 16 L.Ed.2d 218; Rosado v. Wyman, 1970, 397 U.S. 397, 404, 90 S.Ct. 1207, 25 L.Ed.2d 442; Moor v. County of Alameda, 1973, 411 U.S. 693, 710, et seq., 93 S.Ct. 1785, 36 L.Ed.2d 596. Cf. Lazier v. Weitzenfeld, 1975, 505 F.2d 896 [1975]; Perry v. Jones, 1975, — F.2d — [1975].

. . . . . .

JUDGMENT
[Caption as immediately foregoing
filed Sept.16,1974]

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

STATE COURT PROCEEDINGS - TEXAS

NAPPER v. JOHNSON
Cite as 464 S.W.2d 496

Jim L. NAPPER and Wife Jo Ann Napper, Appellants,

v.

Earl B. JOHNSON, Appellee.

No. 4974.

Court of Civil Appeals of Texas, Waco.

Feb. 4, 1971.

Rehearings Denied March 4, 1971

Action to cancel instrument in form of deed. The 160th District Court, Dallas County, Hoyet A. Armstrong, J., rendered judgment for defendant, and plaintiffs appealed. The Court of Civil Appeals, McDonald, C. J., held that finding that grantee did not know or should not have known that grantors intended instrument to operate as mortgage was against great weight and preponderance of evidence.

Reversed and remanded.

1. Evidence ⇐265(10)

Litigant's direct unqualified testimony regarding his personal knowledge is binding on him.

2. Partnership ⇐159

One partner's knowledge, or what he should have known, is binding on other partner.

3. Mortgages ⇐38(5)

Retention of possession by grantor is circumstance indicating mortgage rather than sale.

4. Mortgages ⇐38(1)

Disparity between value of property and sale price is circumstantial evidence that grantee should have known that transaction was intended as mortgage.

5. Mortgages ⇐38(1)

Finding that grantee did not know or should not have known that grantors intended instrument to operate as mortgage was against great weight and preponderance of evidence.

Charles Ben Howell, Dallas, for appellants.

Anderson, Henley, Shields, Bradford & Pritchard, W. A. Pritchard, Dallas, DeLange, Hudspeth, Pitman & Katz, Eugene J. Pitman, Houston, for appellee.

OPINION

McDONALD, Chief Justice.

This is an appeal by plaintiffs Napper and wife from a take nothing judgment, in a suit to cancel an instrument in the form of a deed, which plaintiffs executed to defendant Johnson on their home. Plaintiffs assert the instrument was intended to operate as a mortgage.

Plaintiffs sued defendant alleging they owned their home in Dallas; that they requested a $15,000. loan from defendant; that defendant to mask the real effect of the transaction required plaintiffs to sign a deed to their property; that the deed is void because in truth and in fact it was an intended mortgage. Plaintiffs prayed for cancellation of the deed and that defendant be mandatorily enjoined to convey and return to plaintiffs their property.

Trial was to a jury which found:

1) Plaintiffs Napper and wife intended the instrument they signed to operate as a mortgage on the property, to secure the

amount disbursed by defendant Johnson at the time, rather than an absolute conveyance of such property.

2) Defendant neither knew nor should have known that plaintiffs Napper intended the instrument to operate as a mortgage on the property in question.

The trial court rendered judgment on such verdict that plaintiffs take nothing.

Plaintiffs appeal on 15 points contending among other things, the jury's answer to Issue 2 is so against the great weight and preponderance of the evidence as to be manifestly unjust.

Plaintiffs Napper and wife bought the property here involved on February 11, 1966 from W. D. Sims and wife. It was their homestead. The purchase price was $14,950; and the Nappers executed a deed of trust and vendor's lien note for the amount not paid in cash.

During 1966 plaintiffs moved to Arkansas, and rented their home in Dallas. On January 29, 1969 plaintiffs were in arrears on the note to the Sims, and Sims caused the property to be posted for foreclosure. Plaintiff sought the services of lawyer Pritchard to prevent the foreclosure. Prichard advised plaintiff he had no legal recourse against Sims, but he, Prichard would help plaintiff secure a loan. On February 6, 1969 Pritchard wrote plaintiff that payoff on the Sims note would require $13,009.81, and the best loan which could be expected was a six months loan at 10%. On February 13, 1969 Pritchard wrote plaintiff he had discussed the matter with a wealthy individual he had placed loans with before, and that "he was leary of making a loan for $13,009.81 * * * however, he agreed to advance such funds provided the property is deeded to him, and he will give you a written option to repurchase for $13,660.30". Pritchard thereafter told plaintiffs the transaction was a loan, but that it was necessary to handle the loan in this manner, "because of the homestead law".

It was thereafter agreed that defendant would provide $15,000 and that the amount returnable to him at the end of 6 months would be $15,750. Out of the $15,000 provided by defendant $13,041.42 was paid Sims; $94.89 was paid for taxes; $132. paid for title policy; $440. paid Pritchard for attorneys fee; and $1291.50 turned over to plaintiffs. Plaintiffs executed a deed to defendant to the property, and defendant and plaintiffs executed an option contract whereby plaintiffs could repurchase the property for $15,750 up to 180 days from February 25, 1969.

As the 180 day period began to run out plaintiff applied to lawyer Pritchard for an extension. Pritchard advised he would have to talk with defendant Johnson. The matter had not been resolved by August 21, 1969 when plaintiff came to Dallas to see what could be done. He could not get an answer from Pritchard. On August 25 Pritchard advised plaintiff that Johnson would give no extensions. Plaintiff secured present counsel and raised $15,750. in cash, and on August 26 took same to Johnson's office which was closed; then went to Johnson's house to tender the money, where Johnson's wife told plaintiff that Johnson was out of town, and that lawyer Pritchard took care of his business. (Johnson contends the tender was one day late).

Lawyer Pritchard prepared all papers. Defendant Johnson testified that he was reluctant to advance the $15,000. but "went ahead and made a deal on it anyway, on the basis if I lost (Pritchard) would pay half of it". Q: That was your agreement with Mr. Pritchard. A: Yes and "On the other hand Mr. Pritchard was to get one half of the profit if we made any money." The record reflects that Pritchard thereafter gave Johnson a check for $7875. for "undivided interest" in "property located at 13211 Emily", and Johnson wrote Pritchard "This will confirm the fact that you have paid me in full for an undivided one-half interest in the property".

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[1, 2] A litigant's direct unqualified testimony regarding his personal knowledge is binding on him, and defendant Johnson testified that Pritchard had a one-half interest in the transaction from the outset. Pritchard and defendant Johnson were partners in the transaction and Pritchard's knowledge or what he should have known, is binding on defendant Johnson. And the record discloses Pritchard and Johnson had participated together in other lending transactions; that Pritchard was Johnson's personal lawyer, and Johnson testified he "asks his (Pritchard) advice on any matter pertaining to property we own together or I own".

There is circumstantial evidence that lawyer Pritchard did in fact keep defendant Johnson fully advised and that defendant "should have known" and probably actually knew of the representations made to plaintiffs and of plaintiff's intentions as to the transaction. In any event, Pritchard and Johnson were and are partners in the transaction, and Pritchard's knowledge is binding on Johnson.

[3] The record further discloses that a Mrs. Burns was renting the property from plaintiffs for $50. per month; that on August 28, 1969 lawyer Pritchard notified Mrs. Burns to pay the rent thereafter to defendant Johnson; that she paid to Johnson one month, and thereafter resumed paying rent to plaintiffs. Defendant Johnson, though he has a deed to the property since February 1969 did nothing to collect rent or exercise any possessory rights until August 28, 1969. This is strange conduct if he really considered he bought the property back in February. This is logical conduct if defendant only held a mortgage to the property. Retention of possession by plaintiff is a circumstance indicating a mortgage and not a sale. Wood v. DeWinter, Tex. Civ.App. (NWH) 280 S.W. 303; Ruffier v. Womack, 30 Tex. 332; Hubby v. Harris, 68 Tex. 91, 3 S.W. 558; Bemrod v. Heinzelman, Tex.Civ.App., Er.Dism., 263 S.W. 951.

[4] Finally the record reflects the property is worth $50,000. to $60,000. This is circumstantial evidence that defendant should have known that the transaction was intended to operate as a mortgage. Temple Nat. Bk. v. Warner, 92 Tex. 226, 47 S.W. 515; Moorhead v. Ellison, Er.Ref., 56 Tex. Civ.App. 444, 120 S.W. 1049; Norton v. Lea, Tex.Civ.App. (NWH) 170 S.W. 267; Wood v. DeWinter, supra. See also: Bradshaw v. McDonald, 147 Tex. 455, 216 S.W. 2d 972; Wilbanks v. Wilbanks, Tex., 330 S.W.2d 607; Thigpen v. Locke, Tex. 363 S.W.2d 247; Maxey v. Citizens National Bank, Tex.Civ.App. (NWH), 432 S.W.2d 722.

[5] From the record as a whole we think the finding that defendant did not know or should not have known plaintiffs intended the instrument to operate as a mortgage is against the great weight and preponderance of the evidence. Plaintiffs' contention is sustained. In re Kings Estate, 150 Tex. 662, 244 S.W.2d 660.

The case is reversed and remanded. In view of the unlikelihood of other matters plaintiffs complain of arising on another trial, we do not pass on same.

Reversed and remanded.

. . . . . .

NO. 69-8097 JIM L. NAPPER AND WIFE, JO ANN NAPPER V. EARL B. JOHNSON, 162ND DISTRICT COURT, DALLAS COUNTY, TEXAS

SUPPLEMENTAL MOTION FOR DISQUALIFICATION OF JUDGE

COME now JIM L. NAPPER, JO ANN NAPPER and CHARLES BEN HOWELL, each of them being parties to the above and foregoing cause of action who without waiving and still insisting upon their Motion for Disqualification of Judge heretofore filed, together with their Motion to Call Another Judge to Conduct Hearing Upon Motion for Disqualification of Judge heretofore filed and their Motion to Prohibit the Honorable Dee Brown Walker from Resuming to Preside in This Case heretofore filed who would show the following:[Remainder omitted]

. . . . . .

MOTION TO CERTIFY DISQUALIFICATION OF JUDGE
[Caption as immediately foregoing]

Come now JIM L. NAPPER, JO ANN NAPPER and CHARLES BEN HOWELL who as an alternative to their Supplemental Motion for Disqualification of Judge would show that the Honorable Dee Brown Walker has already found and declared himself to be disqualified to further proceed for the following reason: [Remainder omitted]

. . . . . .

MOTION TO CALL ANOTHER JUDGE TO CONDUCT HEARING UPON SUPPLEMENTAL MOTION FOR DISQUALIFICATION OF JUDGE
[Caption as immediately foregoing]

Come now the movants, JIM L. NAPPER, JO ANN NAPPER and CHARLES BEN HOWELL who would show that they have filed herein their Supplemental Motion for Disqualification of the Honorable Dee Brown Walker as Judge in this cause of action. For the reasons stated in the said Supplemental Motion for Disqualification, movants fear and have reason to

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fear that they cannot obtain a fair and impartial hearing upon their said supplemental motion for disqualification. [Remainder omitted]

. . . . . .

HEARING ON MOTION FOR NEW TRIAL had in the above numbered and entitled cause on the 2nd day of May, A.D.1975, before the HONORABLE DEE BROWN WALKER, Presiding Judge of the 162nd Judicial District Court of Dallas, Dallas County, Texas, to-wit:

THE COURT: All right, did you file a motion for new trial, Mr. Gormley? MR. GORMLEY: We filed one.

THE COURT: Did you file one, Mr. Howell? MR. HOWELL: If Your Honor please, we have filed motions to disqualify and I believe they take precedence--

THE COURT: Well, they are overruled. MR. HOWELL: If Your Honor please, we are ready to proceed on them at this time.

THE COURT: Overruled. MR. HOWELL: Could Your Honor state into the record whether he's had an opportunity to examine them?

THE COURT: Overruled. Now I am going to go on to the motion for new trial. Do you want a new trial? MR. HOWELL: May I-- THE COURT: Do you want a new trial, that's all I want to hear? MR. HOWELL: May I ask Your Honor to state whether or not he's had an opportunity to examine our motion to call another judge to have a hearing on supplemental motion for disqualification of judge.

THE COURT: Overruled. MR. HOWELL: Could Your Honor state into the record whether he has had an opportunity to examine them.

THE COURT: Counsel, if you repeat that once more, I am going to lead you out of the courtroom. Now do you want to hear the motion for new trial or not? MR. HOWELL: May we have a bill of

exception--THE COURT: You may. MR. HOWELL: -- with respect to His Honor's statement.

THE COURT: You may. Do you want a new trial or don't you? MR. HOWELL: I am asking Your Honor at this time to state whether or not he has had an opportunity to examine our motion to call another judge to conduct the hearing, and if we could have that in the record, I believe we could move along. THE COURT: Overruled. Let me hear these. MR. HOWELL: All right, if His Honor please--

THE COURT: I don't care to hear from you any further, Mr. Howell. MR. HOWELL: Is Your Honor-- THE COURT: Sheriff, lead him out of the courtroom. What do you want, Mr. Howell? MR. HOWELL: May we have our bill of exceptions?

THE COURT: You may. MR. HOWELL: May we have Your Honor to-- THE COURT: Lead him out of the courtroom. MR. HOWELL: All right.

THE COURT: Do you want a new trial? MR. PRITCHARD: Yes, Your Honor. THE COURT: Granted. I'll also grant yours.

MR. HOWELL: Could we have the record reflect that Mr. Howell is being escorted out of the courtroom at the time that the Court announced his ruling and that I am now being pulled out bodily by the Sheriff. [Remainder omitted]

. . . . . .